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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1947**

**No. 533**

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**TORAO TAKAHASHI, PETITIONER,**

**vs.**

**FISH AND GAME COMMISSION, LEE F. PAYNE, AS  
CHAIRMAN THEREOF, ET AL.**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF CALIFORNIA**

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**PETITION FOR CERTIORARI FILED JANUARY 16, 1948.**

**CERTIORARI GRANTED MARCH 15, 1948.**





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No.

TORAO TAKAHASHI, PETITIONER,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE,  
AS CHAIRMAN THEREOF, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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[fol. 1]

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES**

No. 513869

**TORAO TAKAHASHI, Petitioner,**

**vs.**

**FISH AND GAME COMMISSION, LEE F. PAYNE, AS CHAIRMAN THEREOF, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as members thereof, Respondents**

**PETITION FOR WRIT OF MANDAMUS—Filed May 6, 1946**

The petitioner alleges:

**I**

The petitioner is a resident of the County of Los Angeles; and a resident of the United States. He was born in Japan; he arrived in the United States legally, and he is a lawful resident of the United States, and of the County of Los Angeles; and has been such since 1907. By occupation, he is a commercial fisherman; he has engaged in said occupation in California, since 1915; and since said date applied annually for a commercial fishing license to the respondent, Fish and Game Commission, and at all times, until 1941, was issued, annually, such a license. In 1942, the petitioner, along with other persons of Japanese descent, was evacuated from California by military order; but returned to California in October, 1945, to resume his former occupation.

He has qualified to obtain a fishing license within all of the requirements of the California Fish and Game Code, and particularly with Chapter V thereof, dealing with "Commercial Fishing Regulations," in every respect and particular, except only that he is a person of Japanese descent.

He has no other occupation except that of commercial fishing; upon his return to California, he attempted to secure other employment, and has been unable to do so.

The petitioner's two sons, Kenichi and Fumio, served in the United States Army. The former is now in Japan, and

has been overseas since November, 1945; in addition his two sons-in-law are in the Service, Lieutenant R. G. Nonoshita and Corporal Mas Hirashima, the latter having volunteered in January, 1942, served overseas one year in the Air Corps and was wounded and received a Purple Heart, and also an oakleaf cluster.

## II

The respondents, Lee F. Payne, W. B. Williams, Harvey E. Hastain, and William Silva, are members of the Fish and Game Commission of the State of California; the respondent, Lee F. Payne, being chairman thereof, and having his residence in, and his office in, the County of Los Angeles; the respondents are charged with administering the Fish and Game Code of California, including the issuing of commercial fishing licenses.

## III

The respondents refuse to issue a commercial fishing license to the petitioner solely because of his Japanese ancestry, and solely because of the provisions of Section 990 of the Fish and Game Code.

Said Section, on its face, and as applied to the petitioner, is unconstitutional, because enacted for the purpose and [fols. 3-6] administered in a manner to discriminate against persons, including the petitioner, solely because of his race. It denies the petitioner liberty and property in violation of due process of law under the California Constitution as guaranteed in Art. I Section 13, and by the XIVth Amendment to the Constitution of the United States; and additionally denies the petitioner the equal protection of the laws under said XIVth Amendment.

## IV

The petitioner has no other or adequate or any remedy at law or in any proceeding other than by this petition for a writ of mandamus.

Wherefore the petitioner prays for a writ of mandamus ordering the respondents to issue to the petitioner a commercial fishing license, for an alternative writ of mandamus.

And the petitioner prays for such other relief as is proper; and for his costs.

Wirin, Maeno and Tietz, by A. L. Wirin, Attorneys for Petitioner.



**[fol. 7] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES**

**[Title omitted]**

**ANSWER—Filed May 13, 1946**

Come now respondents as above named and, in answer to the petition on file herein, deny and aver as follows:

**I**

Answering Paragraph I of said petition respondents aver that they have no information or belief upon the subjects sufficient to enable them to answer, and basing their answer on that ground deny each and every, all and singular, generally and specifically, the allegations contained in Paragraph I except that portion thereof reading as follows: (a) "and since said date applied annually for a commercial fishing license to the respondent, Fish and Game Commission, and at all times, until 1941, was issued, annually, such a license."

Answering that portion of Paragraph I of said petition last quoted hereinabove respondents aver that at date hereof [fol. 8] they have not had the opportunity to check or review the commercial fishing licenses issued to various persons from the year 1915 to 1941, inclusive, to ascertain whether or not such licenses had been ever issued to this petitioner, and basing their answer upon such lack of information deny the said allegations last quoted hereinabove, and each and every one of them.

**II**

Answering the allegations of Paragraph III of said petition, respondents deny that they refused or now refuse to issue a commercial fishing license to said petitioner solely because of his Japanese ancestry. In this respect respondents are informed and believe, and upon such information and belief, aver that petitioner is a person ineligible to citizenship of the United States, and by virtue of the provisions of section 990 of the Fish and Game Code of California, respondents are not authorized or empowered to issue a commercial fishing license to said petitioner.

Further answering Paragraph III of said petition, respondents deny each and every, all and singular, generally and specifically, the allegations contained in that portion of



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said paragraph commencing at line 31, page 2, and ending at the end of line 7, page 3 thereof.

As and for a second and separate defense respondents allege that the petition of petitioner on file herein does not state facts sufficient to constitute a cause of action, or a cause of action against respondents, or any of them.

As and for a third and separate defense respondents are informed and believe and therefore allege that said petitioner is not qualified to receive or to have issued to him a commercial fishing license under the provisions of section [fols. 9-10] 990 of the Fish and Game Code of the State of California.

As and for a fourth and separate defense, respondents are informed and believe and therefore allege that the said petitioner has not legal capacity to sue or to maintain or institute the above captioned proceeding in mandamus. In this respect respondents further allege on such information and belief that petitioner is an alien enemy of the United States of America.

Wherefore, respondents pray that petitioner take nothing by his said petition for Writ of Mandate; that said petition be dismissed and that respondents recover their costs of suit herein and for such other and further relief as to the court may seem meet and proper in the premises.

Robert W. Kenny, Attorney General; Ralph W. Scott, Deputy Attorney General, Attorneys for Respondents.

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[fol. 11] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

NOTICE OF MOTION TO STRIKE CERT PARTS OF PETITION—Filed  
May 13, 1946

To petitioner above named and to Messrs. Wirin, Maeno and Tietz, his attorneys:

Please take notice that on Tuesday, the 28th day of May, 1946, at the hour of 10 a. m. of said day, or as soon thereafter as counsel may be heard in the court room of the above-entitled court, Department No. 34 thereof, Los An-

geles, California, respondents will move said court for its order striking out the following portions of petitioner's petition to wit:

a. That portion of Paragraph I of said petition appearing on page 1 thereof reading as follows: "he arrived in the United States legally, and he is a lawful resident of the United States, and of the County of Los Angeles";

[fols. 12-13] b. That portion of Paragraph I of the said petition commencing with the words "In 1942" at line 31, page 1 of said petition and ending with the word "occupation" in line 2, page 2 of said petition.

c. All of lines 8, 9 and 10, page 2 of said petition.

d. All of lines 11 to 17 inclusive, page 2 of said petition.

e. That portion of Paragraph III commencing at line 31, page 2 of said petition and ending at the end of line 7, page 3 of said petition.

Said motion will be made separately and severally as to each of the foregoing designated portions of said petition, and separately as to each separate matter and allegation in each of said designated portions.

Said motion will be made, on the separate and several grounds that the portions of said petition sought to be stricken are immaterial, irrelevant, redundant, evidentiary or conclusions of law.

Said motion will be based upon this Notice of Motion and on the records and files herein.

Dated: May 10, 1946.

Robert W. Kenny, Attorney General, Ralph W. Scott, Deputy Attorney General, Attorneys for Respondents.

#### Authorities

Section 453 Code of Civil Procedure.

21 Cal: Jur. 247-250, sections 172, 173 and 174.

[fol. 14] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

MINUTE ORDER ON MOTION TO STRIKE—June 7, 1946

Petitioner's motion for peremptory writ of mandate: motion to strike and demurrer come on for hearing. Wirin, Maeno & Tiets by A. L. Wirin appearing as attorneys for the plaintiff and Robert W. Kenny, Attorney General by Ralph W. Scott, Deputy Attorney General for the defendants. Said motion to strike is granted as to specifications A and D. Motion for writ of mandate and demurrer are submitted.

[fol. 15] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

AMENDMENT TO PETITION FOR WRIT OF MANDATE—Filed June  
7, 1946

Leave of Court having been granted, the petitioner amends his petition by adding the following: "by commercial fishing on the high seas" after the word "occupation" on page 1, line 27, in paragraph I of the petition; and adding the following phrase "to engage in commercial fishing on the high seas" at p. 3, line 14 after the word "license" in the prayer of said petition.

Wirin, Maeno, and Tiets, by A. L. Wirin, Attorneys  
for Petitioner.

[fol. 16] IN THE SUPERIOR COURT

513869

MINUTE ORDER OVERRULING DEMURRER—June 13, 1946

Demurrer to petition heretofore submitted is now overruled and judgment is ordered for the petitioner.

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[fol. 17] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 513,869

TORAO TAKAHASHI, Petitioner,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman  
thereof, W. B. Williams, Harvey E. Hastain, and William  
Silva, as Members thereof, Respondents

JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE—June  
25, 1946

The above matter having come on for hearing upon petitioner's application for a peremptory writ of mandate, and the matter having been argued and submitted upon the record by the respective parties,

It Is Ordered that the demurrer of respondents contained in their answer be and the same is overruled; and the court finds from the record that petitioner is a person ineligible to citizenship in the United States, but that he is qualified to have issued to him a commercial fishing license, under the provisions of section 990 of the Fish and Game Code, authorizing him to bring ashore in California, for the purpose of selling the same in a fresh state, his catches of fish from the waters of the high seas beyond the State's territorial jurisdiction.

It Is Therefore Adjudged and Decreed that a peremptory [fols. 18-19] writ of mandate be issued, commanding the respondents to issue a commercial fishing license as specified above.

Dated this 25 day of June, 1946.

Henry M. Willis, Judge of the Superior Court.



**[fol. 20] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES**

**[Title omitted]**

**NOTICE OF APPEAL—Filed July 2, 1946**

**To: The Clerk of the Above-entitled Court and to Torao Takahashi, Petitioner, and to Messrs. Wirin, Maeno & Tietz, his Attorneys:**

Please take notice that respondents above named hereby appeal to the District Court of Appeal of the State of California in and for the Second Appellate District from that certain judgment made and entered in the above-entitled Court on or about the 25th day of June, 1946, in favor of petitioner and against respondents, pursuant to which judgment a Peremptory Writ of Mandate is ordered issued commanding said respondents to issue a commercial fishing license under the provisions of Section 990 of the Fish and Game Code to petitioner above named, authorizing him to [fol. 21] bring ashore in California for the purpose of selling the same in a fresh state, his catch of fish from waters of the high seas beyond the territorial jurisdiction of the State of California, and from the whole of said judgment.

**Dated: July 1, 1946.**

**Robert W. Kenny, Attorney General; Ralph W. Scott,  
Deputy, Attorneys for Respondents.**

**[fol. 22] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES**

**[Title omitted]**

**NOTICE AND REQUEST FOR PREPARATION OF TRANSCRIPT—Filed  
July 2, 1946**

**To: The Clerk of the Above-entitled Court and to Torao Takahashi, Petitioner, and to Messrs. Wirin, Maeno & Tietz, his attorneys:**

Please take notice that respondents in the above-entitled proceeding has appealed to the District Court of Appeal of the State of California for the Second Appellate District



from the judgment made and entered in the above-entitled Court on or about the 25th day of June, 1946, in favor of petitioner herein and against respondents herein, and from the whole of said judgment, and respondents hereby request

That a transcript of the record and papers constituting the judgment roll be prepared, and that it include all plead-[fols. 23-24] ings, records and files in the matter, including notices of appeal, the minute orders of the Court, the appearance, the notice of motion for peremptory writ of mandate, the amended notice of motion for peremptory writ of mandate, the petition for writ of mandate, the notice of motion to strike out parts of the petition, the answer of respondents, the amendment to the petition for writ of mandate, the judgment granting peremptory writ of mandate, and the memorandum of opinion of the Court dated June 13, 1946.

Request is also made for a transcript of the testimony offered or taken, evidence offered or received, including all documentary evidence and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made and prepared in accordance with the provisions of Section 853a of the Code of Civil Procedure of the State of California, and all the provisions of said Code relating to appeals, or that any transcript made up and prepared herein show the absence or lack of any testimony or evidence offered and received in the proceedings of the trial court.

Dated: July 1, 1946.

Robert W. Kenny, Attorney General; Ralph W. Scott,  
Deputy Attorney General, Attorneys for Respondents.

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

APPEARANCE—Filed May 6, 1946

To: The Clerk of the above entitled court, Petitioner above-named and to Messrs. Wirin, Maeno and Tietz, his attorneys:

Please Take Notice that the respondents above named hereby appear in the above entitled proceeding or cause by and through their undersigned attorneys:

Dated: May 3, 1946.

Robert W. Kenny, Attorney General; Ralph W. Scott,  
Deputy Attorney General, Attorneys for Respondent.

[fols. 27-28] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES .

[Title omitted]

NOTICE OF MOTION FOR PEREMPTORY WRIT OF MANDATE—Filed  
May 6, 1946

To the Respondents Above-named:

You, and each of you, will please take notice that the petitioner will apply for a peremptory writ of mandate, in the above-entitled Court, in Department 34 thereof, at Los Angeles, California, on the 28th day of May, 1946, at 10 a. m.

Wirin, Maeno, and Tietz, by A. L. Wirin, Attorneys for Petitioner.

[fols. 29-32] IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

AMENDED NOTICE OF MOTION FOR PEREMPTORY WRIT OF  
MANDATE—Filed May 10, 1946

To the Respondents Above-Named:

You, and each of you, will please take notice that the petitioner will apply for a peremptory writ of mandate, in the above-entitled Court, in Department 34 thereof, at Los Angeles, California, on the 29th day of May, 1946, at 10 a. m.

Wirin, Maeno, and Tietz, by A. L. Wirin, Attorneys  
for Petitioner.

[fol. 33] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 513869

TORAO TAKAHASHI, Petitioner,

vs.

FISH AND GAME COMMISSION, et al., Respondents

MEMORANDUM OF OPINION—Filed June 13, 1946

This is a proceeding in mandamus by which petitioner seeks to secure a peremptory writ compelling respondents to issue to him, under the provisions of the Fish and Game Code, a commercial fishing license to engage in commercial fishing on the high seas, (defined as the open, unenclosed waters of the ocean, in U. S. v. Rodgers, 150 U. S. 249).

The complaint alleges that petitioner is a resident of Los Angeles, California, since 1907; that he was born in Japan; that by occupation he is a commercial fisherman by commercial fishing on the high seas since 1915, having annually applied for and had issued to him a commercial fishing license from respondent Commission up to 1941; that in 1942, with other Japanese persons he was evacuated from California by military order and returned to California in

October 1945 to resume his former occupation; that he has qualified to obtain a commercial fishing license in all respects as required by the code provisions except only that he is a person of Japanese descent and is ineligible to citizenship in the United States.

The respondents have filed an answer to this petition, alleging that petitioner is a person ineligible to citizenship of the United States, and by virtue of the provisions of Section 990 of the Fish and Game Code of California, respondents are not authorized or empowered to issue a commercial fishing license to petitioner.

For further answer, respondents demur generally to the petition, and also on the ground that petitioner has not legal capacity to sue or maintain this action for the reason that he is an alien enemy of the United States.

As an enemy alien, resident in this state, petitioner may institute and maintain his present suit in this court under the present state of the law. (Ex Parte Kawato, 317 U. S. 69; In Re Kohn, No. 472151 of this Court—Judge Wilson's opinion.)

The general demurrer creates the real issue herein, which is one of law only, and under the facts and the provisions of the Fourteenth Amendment to the Constitution of the United States it must be overruled, on the ground that the provision in Section 990 of the Fish and Game Code which limits issuance of commercial fishing licenses to persons other than a person ineligible to citizenship, is clearly in violation of the Fourteenth Amendment.

In tracing the history of that provision, the Supreme Court of the United States in the case of *Truax v. Corrigan*, 257 U. S. 312, said:

"Our whole system of law is predicated on the general fundamental principle of equality of application of the law: 'All men are equal before the law'; 'This is a government of laws, not of men'; 'No man is above the law';—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply law. But the framers and [fol. 35] adopters of this amendment embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor, and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an



equality of treatment of all persons, even though all enjoyed the protection of due process."

➤ In 1935 the District Court of Appeal of the Fourth Appellate District decided the case of *Abe v. Fish & Game Commission* (9 C. A. 2nd 300) in which a petition for hearing was denied by the Supreme Court. In that case plaintiff sought to enjoin the Commission from molesting him and the members of the crew of his fishing boat and from preferring against them any charges under the provisions of Section 990 of the Fish and Game Code. (Stats. 1933, Chap. 73, p. 479.)

At that time Section 990 read exactly the same as appears now in the first paragraph of the 1945 amendment, but the present second paragraph in its pertinent part then read as follows:

"A commercial fishing license may be issued only to a person who has continuously resided within the United States for a period of one year immediately prior to the time he makes application for such license

For comparison by juxtaposition we quote here the second paragraph of the 1945 amendment in its corresponding pertinent part:

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship.

Thus we see in the 1933 version the limiting qualification of one year's continuous residence in the United States, while in the 1945 version it is eligibility to citizenship in the United States.

In the *Abe* case above cited, the complaint alleged that the plaintiff was the owner of a fishing boat which for two years he had used in taking fish from "ocean waters outside of the State of California and beyond the jurisdiction [fol. 36] thereof and in bringing the same ashore within the State of California for the purpose of selling the same in a fresh state"; that he had a commercial fishing license but that none of his crew of six persons had resided continuously within the United States for a period of one year last past and none was eligible to procure a commercial fishing license under the code section above referred to;



that defendants had threatened to charge plaintiff and his said crew with violating Section 990 of said code; that said code section was in violation of the Constitution of the United States and the State of California. A demurrer was overruled and defendants declining to answer, judgment was entered in favor of plaintiff, from which an appeal was taken and on which appeal the judgment was affirmed by the District Court of Appeal and later confirmed by the denial of a petition for hearing by the Supreme Court.

In approaching a decision of the case the District Court said:

"The main and, we think, the decisive question here presented, is whether this section of the Fish and Game Code violates the equal protection clause of the fourteenth amendment to the federal Constitution in requiring a license of every person who assists in bringing of fish caught on the high seas into this state, for the purpose of selling the same in a fresh state, and in limiting the issuance of such license to persons who have continuously resided in the United States for a period of one year."

The court then reviewed the case of *Lubetich v. Pollock*, 6 Fed. 2nd 237, involving a statute of the State of Washington making it unlawful for any person to take fish from any waters within the jurisdiction of the state, unless such person was a citizen of the United States, or has declared his intention to become such, and unless he possessed certain residence requirements. In that case the statute was upheld on the ground that all fish within the waters of the state belonged to the people of the state in common, that the power to dispose of such fish was incidental to the ownership of the property, and that in dealing with its own property [fol. 37] erty and permitting it to be converted into private ownership the State was authorized to prescribe terms and conditions upon which this might be done. Our District Court then commented as follows:

"While the right of the state to thus deal with its own property was upheld, the Court there said: 'Obviously it is a denial of the equal protection of the laws when a law-making body, regulating, not its own property, but a private business, undertakes to deny to aliens the right to engage in a lawful trade or labor.'"

The District Court then proceeded to review many cases, among which was *In Re Kotta*, 187 Cal. 27, which involved an act imposing a poll tax on aliens, declared invalid, and in which a definition of the phrase "the equal protection of the laws" was derived from many other cited cases, including that of *Truax v. Raich*, 239 U. S. 33, and that of *Barbier v. Connolly*, 113 U. S. 27, 31. In concluding its decision, the District Court stated:

"The principles of these cases are especially applicable here. The requirement for a commercial fishing license, as applying to persons bringing in fish caught upon the high seas, with the further provision that such a license cannot be obtained by a non-resident, constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions. In fact the discrimination, thus attempted is much more onerous than a mere inequality in taxation, amounting, as it does, to an absolute prohibition. The statute clearly attempts to discriminate against nonresidents in this particular line of work, the only classification attempted being upon the basis of residence. In so far as we are concerned with this statute, this is not a reasonable ground of classification and it follows that the statute is, to that extent, in violation of the provisions of section 1 of the fourteenth amendment to the Constitution of the United States. It is to be understood that we are not here concerned with any question relating to fish caught or taken in any of the waters within the territorial jurisdiction of the state.

"We conclude that section 990 of this Code is void and ineffective in so far as it discriminates between residents and nonresidents of the United States with respect to the bringing into the state of fish caught upon the high seas and outside the territorial jurisdiction of this state, and that the demurrer to the complaint was properly overruled. The judgment is affirmed."

[fol. 38] In reliance upon the foregoing citations, particularly on that just above quoted, this Court must conclude likewise, that the present Section 990 of the Fish and Game Code is void and ineffective in so far as it discriminates

between aliens eligible to citizenship in the United States and aliens who are ineligible to such citizenship with respect to the bringing into the state, in pursuit of a lawful trade, of fish caught upon the high seas and outside the territorial jurisdiction of the state.

The denial to an alien solely because he is an alien ineligible to citizenship, though lawfully an inhabitant of the state, of a commercial fishing license to bring fish, caught upon the high seas, beyond the territorial area of waters within the state's jurisdiction, to the shore within the state, is tantamount to a denial of equal protection of the law guaranteed by the fourteenth amendment to the Constitution of the United States. Such denial does not relate to regulation of disposition of the State's own property but undertakes to regulate a lawful trade or labor engaged in private business, which, as stated in the case of *Lubetich v. Pollock*, supra, amounts to a denial of the equal protection of the laws.

In the case at bar, moreover, it is made obvious by the legislative history of this section that the provision of Section 990 here in question was conceived and produced in its present legislative form to eliminate Japanese aliens from the right to a commercial fishing license.

When first enacted in 1909 (Stats. 1909, p. 302) the law regulating "fishing for profit in the public waters of this state" provided for licenses to any person who was a citizen of the United States upon payment of the sum of two and one half dollars, and to one not a citizen upon payment of ten dollars.

By amendment of 1917 (Stats. 1917, p. 686), the law was changed to read in Section 1 substantially as it now appears [fol. 39] in Section 990 of the Fish and Game Code, covering the business and activities. In Section 3 it was provided that such commercial fishing licenses shall be issued upon application, for a fee of ten dollars, and shall contain the name of the holder, his resident address, and his description by age, height, nationality and color of eyes and hair.

In 1933 the Legislature codified the fish and game laws and the commercial fishing license regulations appear in Chapter 5, Article 1 thereof, beginning with Section 990. Therein for the first time appeared a new qualification as to individual applicants, namely, that of residence within the United States continuously for one year.

In 1943 Section 990 of the Fish and Game Code was amended and therein the clause containing the qualification as to residence was changed to read:

**"A commercial fishing license may be issued to any person other than an alien Japanese."**

At this same session the Senate appointed a fact-finding committee on the subject of Japanese resettlement, which filed its report on May 1, 1945. Among other matters considered was that of "Japanese Fishing Boats," and as to which the committee reported as follows:

**"The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute."**

The present Section 990 as enacted in 1945 is Senate Bill 413 enacted into law. As it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in [fol. 40] ocean waters bordering on California, and as the Court must take judicial notice of the same fact, it becomes manifest that in enacting the present version of Section 990, the Legislature intended thereby to eliminate alien Japanese from those entitled to a commercial fishing license by means of description rather than by name. To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent. Under each and both, alien Japanese are denied a right to a license to catch fish on the high seas for profit, and to bring them to shore for the purpose of selling the same in a fresh state. As was stated in the Abe case, supra, this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class



named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, wherein and whereby a state is forbidden to deny to any person within its jurisdiction the equal protection of the laws. In respect to the right to fish upon the high seas for profit, and to bring the catch to the California shore for the purpose of selling the same in a fresh state, the alien Japanese, resident in California, though ineligible to citizenship in the United States, is entitled to the same equal protection of the laws that is accorded to all other persons engaged in the same business.

The demurrer of respondents is overruled: the motion of petitioner for a peremptory writ of mandamus commanding respondents to issue to him a commercial fishing license authorizing him to bring ashore for sale in a fresh state, his catches of fish from the waters of the high seas and beyond the state's territorial jurisdiction, is granted. Petitioner's [fol. 41] attorney will prepare judgment.

June 13, 1946.

Henry M. Willis, Judge.

[fols. 42-44] Clerk's Certificate to foregoing transcript omitted in printing.



[fo]s. 45-46] PROPOSED SUPPLEMENTAL CLERK'S TRANSCRIPT  
ON APPEAL

[fol. 47] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

APPLICATION FOR ORDER UNDER CCP SEC. 1110(b); AND AFFI-  
DAVIT—Filed July 5, 1946

STATE OF CALIFORNIA,

County of Los Angeles, ss:

Torao Takahashi being first duly sworn, deposes and says:

That he is the petitioner above named. That the respondents have filed a Notice of Appeal, from the judgment of this Court.

That the affiant will suffer irreparable damage in his business if the execution of the present judgment of this Court is stayed on appeal.

The affiant is a commercial fisherman by occupation; and has no other occupation. He has attempted to secure employment other than in the commercial fishing industry; but he has been unable to do so.

The tuna and albacore deep sea fishing season is now on, having begun in June and ending in September.

[fol. 48]. In the event the judgment of this Court is stayed by said appeal, the affiant will be deprived of the right, and the opportunity, to engage in said fishing during said season.

Additionally, there is now in California, as well as throughout the United States, a serious shortage of food; if the affiant is permitted, by the order of this Court, to engage in said fishing, while said matter is on appeal, the affiant will undertake to alleviate said food shortage by bringing to California his share of tuna and albacore.

Dated this 3rd day of July, 1946.

Torao Takahashi.

Subscribed and sworn to before me this 3rd day of July, 1946. Frank F. Chuman, Notary Public in and for the County of Los Angeles, State of California. My Commission Expires Mar. 28, 1950.

[fol. 49] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

ORDER UNDER CCP SEC. 1110(b)—July 5, 1946

Good cause appearing therefore, upon the Application for a Order unedr CCP Sec. 1110(b) of the petitioner and Affidavit in support thereof, and it appearing that the petitioner will suffer irreparable damage in his business if the execution of the judgment of this Court, granting a Writ of Mandate, is stayed,

It is hereby ordered that the appeal heretofore taken from the judgment of this Court granting a Writ of Mandate shall not operate as a stay of execution of said judgment.

Dated at Los Angeles this 5th day of July, 1946.

Henry M. Willis, Judge of the Superior Court.

[fol. 50] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES,

[Title omitted]

AMENDED ORDER UNDER CCP SEC. 1110(b)—July 29, 1946

Good cause appearing therefore, upon the Application for an Order under CCP Sec. 1110(b) of the petitioner and Affidavit in support thereof, and it appearing that the petitioner will suffer irreparable damage in his business if the execution of the judgment of this Court, granting a Writ of Mandate, is stayed,

It is hereby ordered that the appeal heretofore taken from the judgment of this Court granting a Writ of Mandate shall not operate as a stay of execution of said judgment, provided, however that this order shall not affect the jurisdiction of said Fish and Game Commission to cancel or vacate any commercial fishing license granted by said Commission to the petitioner, pending said appeal, in the event the Supreme Court of California or the District Court of Appeal for the Second Appellate District, by a final judgment, adjudges Sec 990 of the Fish and Game

Code which prohibits the respondents from issuing a commercial license to persons ineligible to citizenship, to be [fol. 51] constitutional.

Dated at Los Angeles this 29th day of July, 1946.

Henry M. Willis, Judge of the Superior Court.

[fol. 52] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

TORAO TAKAHASHI, Petitioner,

VS.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman, Thereof, W. B. Williams, Harvey E. Hastain, and William Silva, as Members Thereof, Respondents

AMENDED JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE—July 29, 1946

The above matter having come on for hearing upon petitioner's application for a peremptory writ of mandate, and the matter having been argued and submitted upon the record by the respective parties,

It Is Ordered that the demurrer of respondents contained in their answer be and the same is overruled; and the court finds from the record that petitioner is a person ineligible to citizenship in the United States, but that he is qualified to have issued to him a commercial fishing license, under the provisions of section 990 of the Fish and Game Code.

It Is Therefore Adjudged and Decreed that a peremptory writ of mandate be issued, commanding the respondents to issue a commercial fishing license.

Dated this 29th day of July, 1946.

Henry M. Willis, Judge of the Superior Court.

[fol. 53] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

AMENDED PEREMPTORY WRIT OF MANDATE—August 13, 1946

The People of the State of California Send Greetings to the Fish and Game Commission of the State of California, Lee F. Payne, as Chairman Thereof, W. B. Williams, Harvey E. Hastain, and William Silva, as Members Thereof:

Whereas, upon trial of the issues in the above-entitled action, this court has duly found and adjudged that the petitioner is a person ineligible to citizenship in the United States, but that he is qualified to have issued to him a commercial fishing license, under the provisions of Sec. 990 of the Fish and Game Code.

Now, therefore, we, being willing that speedy justice should be done in this behalf to him, the said petitioner, do command you the Fish and Game Commission of the State of California, Lee F. Payne, as Chairman thereof, W. B. Williams, Harvey E. Hastain and William Silva, as members thereof to issue a commercial fishing license pursuant to Sec. 990 of the Fish and Game Code of California, and [fols. 54-55] we do also command that you make known to us before our Superior Court, in and for the County of Los Angeles, in Department 34 at 9:30 on the 14th day of August, 1946, how you have executed this writ, and have you then and there this writ.

Witness, the Honorable Henry M. Willis, judge of our said Superior Court, and the seal of said court this 1st day of August, 1946.

J. F. Moroney, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by S. V. White, Deputy.



[fol. 56] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[Title omitted]

**STIPULATION TO AUGMENT RECORD—August 14, 1946**

It is hereby stipulated by and between the parties to the above-entitled action, that a supplementary transcript be prepared by the Clerk of this Court to augment the clerk's transcript originally filed with the District Court of Appeal of the State of California Second Appellate District, and now transferred to the California Supreme Court, consisting of the following certified photostatic documents which documents are to be used or considered in the determination of the matter appealed from herein, to-wit:

Affidavit of Plaintiff for Order Under CCP Sec. 1110(b);  
Order under CCP Sec. 1110(b), dated July 5, 1946;

Amended Order under CCP Sec. 1110(b), dated July 29, 1946;

Amended Judgment granting Peremptory Writ of Mandate, dated July 29, 1946;

Amended Peremptory Writ of Mandate;

[fol. 57] This stipulation.

A. L. Wirin and John Maeno, by A. L. Wirin, Attorneys for Plaintiff; Robert W. Kenny, Attorney General, by Ralph W. Scott, Deputy Attorney General, Attorneys for Defendants.

[fols. 58-59] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 60] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. L. A. 19835

TORAO TAKAHASHI, Petitioner and Respondent

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman  
Thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WIL-  
LIAM SILVA, as Members Thereof, Respondents and Appel-  
lants

STIPULATION AUGMENTING RECORD—Filed August 29, 1946

By and through their respective counsel the parties hereby stipulate that the record on appeal in the above entitled cause be augmented to include the Notice of Appeal from the amended judgment, a full, true and correct copy of which Notice of Appeal is annexed to this Stipulation and made a part hereof.

It is further stipulated that the record on appeal in the above entitled cause contained in the Clerk's Transcript and the Supplemental Transcript on appeal shall be deemed the record on appeal in so far as the appeal from the amended judgment, made and entered on or about July 29, 1946, is concerned.

It is further stipulated that the Writ of Supersedeas ordered by the above entitled court in this proceeding extend to the amended judgment of July 29, 1946 and the [fol. 61] amended order of July 29, 1946.

Dated: August 26, 1946.

Wirin, Maeno & Tietz, A. L. Wirin & John Maeno,  
by A. L. Wirin, Attorneys for Respondent; Robert  
W. Kenny, Attorney-General, Ralph W. Scott,  
Deputy, Attorneys for Appellants.

[fol. 62] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 513869

TORAO TAKAHASHI, Petitioner,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman  
Thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WIL-  
liam SILVA, as Members Thereof, Respondents

NOTICE OF APPEAL

To the Clerk of the above-entitled Court and to Torao  
Takahashi, Petitioner, and to Messrs. Wirin, Maeno &  
Tietz, his Attorneys:

Please take notice that respondents above named hereby  
appeal to the Supreme Court of the State of California  
from that certain amended judgment made and entered  
in the above-entitled Court on or about the 29th day of  
July, 1946, in favor of petitioner and against respondent,  
pursuant to which judgment a peremptory writ of mandate  
was ordered issued commanding said respondents to issue  
[fols. 63-64] to petitioner a commercial fishing license.

Dated: August 26, 1946.

Robert W. Kenny, Attorney-General, Ralph W.  
Scott, Deputy Attorney Gen.; Attorneys for  
Respondents.

[fol. 65] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

STIPULATION AS TO FACTS—Filed January 9, 1947

The parties hereby stipulate that the facts contained in  
the annexed "interrogatories of Geraldine Conner" in  
the case of Tsuchiyama vs. Fish and Game Commission

may be considered by the court as facts in deciding the case at bar.

Dated: January 2, 1947.

A. L. Wirin, John Maeno & Baburo Kido, by A. L. Wirin, Attorneys for Petitioner and Respondent; Robert W. Kenny, Attorney General; Ralph W. Scott, Deputy Attorney General, Attorneys for Respondents and Appellants.

[fol. 66] A. L. Wirin and John Maeno, 257 South Spring Street, Los Angeles 12, California. Telephone: Michigan 9708

Attorneys for Plaintiff.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND  
FOR THE COUNTY OF LOS ANGELES

No. 517578

YOSHIKAZU TSUGHYAMA, Plaintiff,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman Thereof, W. B. Williams, Harvey E. Hastain, and William Silva; as Members thereof, and W. B. Williams, Harvey E. Hastain and William Silva, as Individuals, and Robert W. Kenny as Attorney General of the State of California, Defendants

INTERROGATORIES OF GERALDINE CONNOR

1. State your name and address.

Geraldine Conner, 1704-D Sea Cliff Circle, San Pedro, California.

2. State your occupation:

Fisheries Statistician, Bureau of Marine Fisheries, Division of Fish and Game, State of California.

3. Where do you work?

California State Fisheries Laboratory, Terminal Island.



4. How long have you worked there?

About 19 years.

5. What are your duties?

Supervision clerical help compiling marine fisheries statistics.

[fol. 67] 6. Is it not true that you are responsible for the compilation of statistics on applications for commercial fishing license?

Yes, under the direction of W. L. Scofield, Senior Aquatic Biologist.

7. Is it not true that you compiled the statistics which appear in California Fish Bulletins known as "The Commercial Fish Catch of California for the year so and so" and also in the annual or biannual report of the Division of Fish and Game, showing the nativity of applicants for commercial fishing licenses?

Yes, I compiled the statistics from those applications which were complete and gave the nativity of the fishermen.

8. During the last fifteen years, how many persons of the following nativity or race applied for commercial fishing licenses?

Korean, Burmese, Siamese, Arabians, Afghanists, Natives of Malay states, Natives of the Straits Settlement, Dutch East Indians, Sumatrans, Iranians, Sa-  
[fol. 68] moans, Guamese, Hindus, Filipinos.

I do not know. Refer to No. 9.

9. Beginning with the year of 1932, state the year and the number of persons of each of the above nativity who applied for commercial fishing licenses.

Information not available. It would require from one to two months time to check incomplete data for number of cases actually recorded. Original compilations segregated major groups only. The natives of some of the states listed would be credited to the nations with which they were politically affiliated at the time, others were put into the classification—"all others." Koreans might be included with the subjects of Japan; Burmese, Hindus, natives of the Malay states might be combined with the subjects of Great Britain; Samoans could be credited to the United States

or Great Britain. Dutch East Indians and Sumatrans could be credited to Holland. Filipinos would be listed as United States subjects unless supplemental statements on the license applications stated they were aliens.

See also answer to No. 14.

10. Is it not true that on or about October 14, 1946, during the morning thereof, at a conference between yourself and Mr. Frank Chuman and in answer to a query from him, you stated that the number of persons ineligible for citizenship, other than Chinese and Japanese, during the last fifteen years was so small that the number amounted to practically none at all?

No. No provision is made on the license application form to indicate whether the applicant is eligible for citizenship.

[fol. 69] 11. Did you not state to Mr. Chuman at said conversation that other than Chinese or Japanese, those ineligible to citizenship who had applied most were the Koreans and that their number was at most five or six during the last fifteen years?

No.

12. If your answer to question 6 is "no" please state the name of the person who is in charge of such compilation.

W. L. Scofield, Senior Aquatic Biologist, directs the program.

13. If your answer to question 7 is "no" please indicate the name of the person who did compile statistics therein referred to.

W. L. Scofield edits the published report.

14. With reference to question 7 do all of the applications for commercial fishing licenses show the nativity of the applicants? Please explain.

No. In many cases the item "Country or State of Birth" is left blank, or is merely marked with a check which could mean anything.

15. If you answer to question 10 is "no" please state the date and substance of the conversation which you had with Mr. Frank Chuman.

See attached statement.

[fol. 70] 15. On October 14, 1946, Mr. Frank Chuman was brought to my office by Mr. W. L. Scofield. He was

given the Published record covering the nativity of the fishermen. He asked for records of the number of persons ineligible for citizenship who have been issued market fishermen's licenses over a long period of years. He was told that there was nothing on the application which indicated whether or not an applicant was eligible for citizenship. He asked if it would be possible to check the number of Orientals other than Japanese, who have been issued licenses during the past years. He was told that due to the volume of the record it would be impossible to take the time to do this. He asked if I recalled from handling the records if there were such cases and how many. He was told that there were such cases but that I had no basis for an estimate of the number. In the course of the conversation I spoke of one Korean whose case I remember.

16. If your answer to question 11 is "no" please state the substance of the conversation you had with Mr. Chuman and the date thereof.

16. See answer to No. 15.

(Signed) Geraldine Conner.

On this 20 day of December, 1946 before the undersigned, Notary Public in and for the County of Los Angeles, appeared Geraldine Connor, and subscribed to the within interrogatories and stated upon oath that the answers thereto are true and correct to the best of her knowledge and belief.

T. K. Gerstle, Notary Public in and for the County of Los Angeles, State of California. My Commission Expires June 18th, 1948. (Seal.)

Copy

[fol. 71] Filed Oct. 17, 1947, William I. Sullivan, Clerk.  
By H. M. G., S. F. Deputy.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

L. A. No. 19835

TORAO TAKAHASHI, Petitioner and Respondent,

v.

FISH AND GAME COMMISSION, et al., Defendants and Appellants

OPINION—October 17, 1947

The superior court granted a peremptory writ of mandate directing the Fish and Game Commission to issue to the petitioner, Torao Takhashi, an alien ineligible to citizenship of the United States, a commercial fishing license. Upon its appeal from the judgment, the commission asserts that section 990 of the Fish and Game Code, which declares that a license shall not be granted to such an alien, is controlling. The constitutionality of that statute is the only question for decision.

In his amended petition, Takahashi alleges that since 1915, and until 1941, he was a duly licensed commercial fisherman, engaging in that occupation on the high seas. He was evacuated from California by military order in 1942. Upon his return to California in 1945, petitioner asserts, he qualified to obtain a fishing license within all of [fol. 72] the requirements of the California Fish and Game Code "except only that he is a person of Japanese descent". The commission then refused to issue a license to him "solely because of his Japanese ancestry", and "solely because of the provisions of Section 990 of the Fish and Game Code". This provision is unconstitutional on its face and as applied to him, says Takahashi, because it was enacted for the purpose of discriminating against persons solely because of race, and is being administered in furtherance of that purpose. The bar of the statute, therefore, denies him due process of law as guaranteed by the state and federal constitutions and the equal protection of the laws as guaranteed by the federal constitution. The remedy



of mandamus is invoked, the petition concludes, because he has no adequate or any remedy at law or in any other proceeding. The relief sought is a peremptory writ requiring the commission to issue to him a commercial fishing license "to engage in commercial fishing on the high seas".

By its answer, the Fish and Game Commission denies that they refused Takahashi a license because of his Japanese ancestry. Upon information and belief, it asserts that he is ineligible to citizenship of the United States and, for that reason, it is not authorized or empowered under the applicable statute to issue a license to him. The remaining allegations of the petition are denied generally, specifically, or upon information and belief. As separate defenses, the commission alleges that the petition does not state facts sufficient to constitute a cause of action; that Takahashi is [fol. 73] not qualified to receive or to have issued to him a commercial fishing license under the provisions of section 990 of the Fish and Game Code; and that he has no legal capacity to sue.

A demurrer to the petition was overruled. Petitioner then moved for a peremptory writ, the matter came on for hearing upon the pleadings, and judgment was rendered in his favor. By this judgment, the court found that Takahashi, although "a person ineligible to citizenship in the United States, . . . is qualified to have issued to him a commercial fishing license, under the provisions of section 990 . . . authorizing him to bring ashore in California, for the purpose of selling the same in a fresh state, his catches of fish from the waters of the high seas beyond the States territorial jurisdiction."

The commission perfected its appeal from this judgment and the transcript was filed within rule time. A few days later, the superior court, on application of Takahashi, entered an amended judgment directing that, by a peremptory writ of mandate, the commission be ordered to issue to him a commercial fishing license. Under the terms of the amended judgment and the amended peremptory writ of mandate, the commission is required to issue a license to Takahashi permitting him to fish commercially in territorial waters of the state as well as on the high seas.

In aid of appellate jurisdiction, the commission filed a notice of appeal from the amended judgment. By stipulation, the record on appeal was augmented to include the [fol. 74] notice of appeal from the amended judgment, the

affidavit of Takahashi and the original and amended order made under section 1110(b) of the Code of Civil Procedure, the amended judgment granting the peremptory writ of mandate, and the amended peremptory writ of mandate. The amended order made under section 1110(b) provides that the appeal taken from the judgment of the superior court granting the writ of mandate "shall not operate as a stay of execution of said judgment". Upon application of the commission, this court granted a writ of supersedeas staying proceedings upon both judgments until the determination of the appeal.

The commission, represented by the attorney general, does not question the validity of the amended judgment upon the ground that it was rendered after the appeal was perfected because the parties desire to have a decision upon the basis of its provisions. Also, the appellant does not now rely upon its separate defense that Takahashi has no legal capacity to sue.

Turning to the merits of the controversy, the commission contends that fish, like game, is the property of the state and held by it in its sovereign capacity as a trustee for all of its people; therefore, an individual cannot obtain an absolute property right in fish or game except upon such conditions, restrictions and limitations as the state may impose. It is well established, the argument continues, that the state, in the interest of conservation, may confer exclusive rights of fishing and hunting on its own citizens and, [fol. 75] without violating constitutional inhibitions, expressly exclude aliens and nonresident citizens. The state may further classify aliens into two groups, those who are and those who are not eligible for citizenship, and such legislation is presumed to be constitutional. The reduction of the number of persons eligible to fish bears a reasonable relation to the object of conservation of fish and is within the purview of the state's police power; therefore, the classification is a reasonable one. And the inherent power of the state to regulate fish and game applies to fish brought into the state from the high seas by an ineligible alien.

Concerning the question as to whether the statute is being administered so as to discriminate against the Japanese, the commission relies upon the fact that no proof was offered by Takahashi in support of his allegation in that regard. For that reason, says the appellant, the allegations

of the answer must be taken as true. The court may not take judicial notice that Japanese are the only ineligible aliens who engage in commercial fishing in ocean waters bordering California, and there is no basis for a conclusion that there was unconstitutional discrimination against Japanese aliens by description rather than name in the 1945 amendment to section 990. Nor may the court take judicial notice of alleged discrimination, as found in certain reports made by a committee of the California senate and other articles. In conclusion, the commission argues that Section 990 of the Fish and Game Code does not divest [fol. 76] Takahashi of rights under the treaty with Japan, because that treaty was abrogated in 1940.

Takahashi claims that section 990 of the Fish and Game Code is unconstitutional. Because it constitutes discriminatory race legislation, he argues, it violates due process as guaranteed by the California and United States constitutions, and denies equal protection of the laws in violation of the federal constitution. More specifically, he contends that the legislative history of section 990 discloses that this legislation was and is aimed exclusively against persons of the Japanese race. And even if fishing in territorial waters is a privilege granted by the state, rather than a right, the state may not unconstitutionally discriminate because of race, in the grant of that privilege. In support of this claim Takahashi contends that the court should take judicial notice of certain facts; namely, that it was known to the legislature in 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in California waters and that certain articles and senate report show discrimination against this race. The alien also argues that the decisions construing the alien land law are not controlling in the present controversy because they do not concern the right to follow an occupation, and the statute concerning real estate has not been challenged as one aimed exclusively against any particular race.

An appeal removes from the jurisdiction of the trial court [fol. 77] the subject matter of the judgment or order appealed from, including all issues going to the validity or correctness of such judgment or order. The trial court has no power thereafter to amend or correct its judgment or order, or to vacate or to set it aside. Such power cannot be reinvested in the trial court even by the consent of the parties. (*Linstead v. Superior Court*, 17 Cal. 2d 9; *Kinard*

v. Jordan, 175 Cal. 13; Parkside Realty Co. v. MacDonald, 167 Cal. 342.) The amended judgment is, therefore, void, but an appeal may be prosecuted from it as a "special order made after final judgment", for the purpose of having the determination reviewed and reversed. (Code of Civ. Proc., sec. 963, subd. 2; Ivory v. Superior Court, 12 Cal. 2d 455, 460; Luckenbach v. Krempel, 188 Cal. 175, 177; see 2 Cal. Jur., Appeal and Error, sec. 40.)

Section 990 of the Fish and Game Code requires "every person who uses or operates or assists in using or operating any boat . . . to take fish . . . for profit", or who brings fish ashore "at any point in the State for the purpose of selling the same in a fresh state", to procure a commercial fishing license. Such a license "may be issued to any person other than a person ineligible to citizenship." This section was first codified in 1933 (Stats. 1933, ch. 73; based on Stats. 1909, ch. 197, as amended.) At the same session of the legislature, the section was amended (Stats. 1933, ch. 696), and contained a restriction against persons who had not lived in the United States for one year. This restriction was held unconstitutional in *Abe v. Fish and Game Commission*, 9 Cal. App. 2d 300. The hunting license section (427) of the Fish and Game Code, prior to 1945 and at the present time, classifies persons, for the purpose of imposing fees, as those under and over the age of 18 years, [fol. 78] citizen residents of this state, nonresident citizens, resident declarant aliens, and those who have not declared their intention of becoming citizens. Section 428 of the same code, relating to sport fishing licenses, also classifies persons into groups of those over and under 18 years, residents and nonresident citizens of the United States, and aliens. In 1943 (Stats. 1943, ch. 1100) these sections were amended and "alien Japanese" were singled out by name as the only persons not qualified for a license to hunt, or fish for pleasure or profit. However, in 1945 (Stats. 1945, ch. 181), each of these sections was amended so as to deny an alien "ineligible to [United States] citizenship" the privilege of obtaining either a hunting, sport fishing or a commercial fishing license.

The Fourteenth Amendment to the federal constitution is not confined to the protection of citizens. It applies to all persons within the territorial jurisdiction, without regard to differences of race, creed, color or nationality. (In re Kotta, 187 Cal. 27; *Truax v. Raich*, 239 U. S. 33; *Yick Wo v.*



Hopkins, 118 U. S. 856; Wormsen v. Moss, 29 N. Y. S. 2d 798.) The equality guaranteed is equality under the same conditions, and among persons similarly situated. However, the legislature may make a reasonable classification of persons and businesses and pass special legislation applying to certain classes. The rule is that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished. (Watson v. Division of Motor Vehicles, 212 Cal. 279; Pacific Indemnity Co. v. Myers, 211 Cal. 635; Superior etc. Corp. v. Superior Court, 203 Cal. 384; In re Kotta, *supra*; Gulf etc. Co. v. Ellis, 165 U. S. 150.)

As stated in Wormsen v. Moss, *supra*, "... the free right to labor is subject to the qualification that the right may be interfered with by the State, in the exercise of its general police power, in the interests of the health, morals, safety or welfare of the community. Such action of the State must, however, be reasonable, bear a just and reasonable relation to the promotion of the general welfare, and avoid arbitrary discrimination between persons. A statute enacted in the exercise of the police power must have been passed to prevent some manifest evil or to preserve public health, morals, safety or welfare... If the calling is one that the State, in the exercise of its police power, may prohibit either absolutely or conditionally, by the exaction of a license, the fact of alienage may justify a denial of the privilege. But even then, there must be some relation between the exclusion of the alien and the protection of the public welfare." (29 N. Y. S. 2d 801, 803.) Stated another way, the test of the constitutionality of legislation denying aliens the right to obtain a license to pursue a business is whether the classification has some reasonable basis in the welfare of the community. (Miller v. City of Niagara Falls, 202 N. Y. Supp. 549.)

[fol. 80] When a legislative enactment is attacked upon the ground of discrimination, all presumptions and intentions are in favor of the reasonableness and fairness of the legislative action. The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant. The decision of the legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably

arbitrary. (People v. Globe Grain & Mill Co., 211 Cal. 121, 127; People v. Monterey Fish Products Co., 195 Cal. 548, 556; Alabama State Federation v. McAdory, 323 U. S. 450, 465; United States v. Carolene Products Co., 304 U. S. 144, 152.) The only possible limitation upon this rule is where the legislation attempts to restrict fundamental liberties. (See, United States v. Carolene Products Co., *supra*, p. 152; Thornhill v. Alabama, 310 U. S. 88.)

The statute now challenged regulates the bringing ashore in California of fish caught in territorial waters and on the high seas, and prohibits the issuance of commercial fishing licenses for either of these purposes to aliens ineligible to United States citizenship. It has long been held that the state is the owner of the fish in coastal waters and may regulate the taking of them for private use. "The legislature may dispose thereof as to it may seem best, only subject to constitutional limitations against discrimination. [fol. 81] Within those limitations, the legislature, for the purpose of conserving and protecting fish, may pass such laws as to it seem wise, and the question what measures are best adapted to that end are for its determination . . . [citations] . . . Such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose." (People v. Monterey Fish Products Co., *supra*, p. 563; see, In re Makings, 200 Cal. 474, 481; People v. Glenn-Colusa Irr. Dist., 127 Cal. App. 30, 36; Bayside Fish Flour Co. v. Zellerbach, 124 Cal. App. 564, 566.)

It is well established that the legislature has the most extensive powers over the fish and game within its jurisdiction. (In re Makings, *supra*, p. 481.) The broad powers of the state in this regard were early established in Ex Parte Maier, 103 Cal. 476, where the court said, "The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation; or the public good." (See, Lubetich v. Pollock, 6 Fed. 2d 237 and cases cited therein.)

The right of the state to confer exclusive rights of hunting and fishing within its borders upon its own citizens is, there-

fore, beyond question. Also, citizens of other states, aliens, [fol. 82] and alien residents may be constitutionally denied the privilege. (*Lacoste v. Dept. of Conservation*, 263 U. S. 545; *Patson v. Pennsylvania*, 232 U. S. 138; *Geer v. Connecticut*, 161 U. S. 519; *McCreedy v. Virginia*, 94 U. S. 391; *Lubetich v. Pollock*, *supra*; *In re Eberle*, 98 Fed. 295; *Cummings v. The People*, 211 Ill. 392; *Commonwealth v. Hilton*, 174 Mass. 29; *State v. Kofines*, 33 R. I. 211; *People v. Setunsky*, 161 Mich. 624; *State v. Leavitt*, 105 Me. 76; *People v. Brennan*, 255 N. Y. S. 331; *State v. Niles*, 78 Vt. 266; *Alsos v. Kendall*, 111 Ore. 359; *State v. Maybury*, 136 Wash. 210.) The broad powers of the state in this regard are set forth in *Lubetich v. Pollock*, *supra*, where the court stated: "In the light of the foregoing authorities it seems unescapable that the state owns the food fish in the waters over which it has jurisdiction, the same as any other proprietor owns property, and that aliens and nonresidents of the state may be constitutionally denied the right to take fish within its borders. The power to make such disposition of the fish arises out of and is incidental to the ownership of the property." (6 Fed. 2d 240.) Answering the contention that the Washington statute denied an alien the right to engage in a lawful occupation, the district court adopted with approval the following declaration by the Supreme Court of Oregon: "The rights of the state in the fish and in the waters from which the fish are to be taken are superior to plaintiff's right to choose fishing for salmon in those waters for an occupation. Such an occupation is not open to an alien [fol. 83] against the legislative will of the state, since it involves the appropriation of property belonging to the state in its sovereign capacity. The state, in prohibiting aliens from engaging in the taking of salmon fish, is dealing with the common property of the people of the state; in prohibiting citizens of other states and unnaturalized foreign-born residents from fishing in the public waters of the state the state is, in fact, dealing with a property right of the state, and not with a mere privilege or immunity of a citizen of another state, nor does it amount to a denial to an alien within the state of the equal protection of its laws. Under the police power of the state the Legislature may prescribe any terms or conditions reasonably necessary for the preservation of the fish, but in the enactment of this law the Legislature was not legislating under its police powers, but under its reserved powers as the owner of the

property which was the subject of the legislation, and which was to be affected thereby. As such owner it was authorized to prescribe any terms or conditions upon which the property of the state might be converted into private ownership. In legislating to that end it was dealing with its own property, and it had all of the rights and powers of an individual owner subject only to the duties which it owed to its own citizens." Under the broad powers resting in the state in regard to the regulation of its fish and game as established by these authorities, it is clear that a state may withhold the privilege of hunting and fishing from aliens ineligible to [fol. 84] United States citizenship.

This court recently held in *People v. Oyama*, 29 A. C. 157, that the Alien Land Law (Alien Property Initiative Act of 1920, Stats. 1921, p. lxxxiii, as amended; 1 Deering's Gen. Laws, Act 261) is constitutional. The broad powers of the state to regulate the ownership of real property within its boundaries were re-stated, and it was held that a state may prohibit, subject to a treaty to the contrary, the ownership of its lands by aliens ineligible to United States citizenship. The opinion points out that "Upon the subject of equal protection," the United States Supreme Court in *Terrace v. Thompson*, 263 U. S. 197, "held that the classification was reasonable, saying that the rule established by Congress on the subject of naturalization 'in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act.'" The basis of the classification regarding real estate is the same as the one upon which the statute here in controversy rests. By one statute, the state prohibits the ownership of land by ineligible aliens. In the other enactment the legislature has declared that such persons shall not take fish from its waters.

In many decisions the courts have upheld a classification of persons by which nonresidents and aliens were denied hunting and fishing privileges. In so far as conservation is concerned, it is just as reasonable to classify aliens upon the basis of eligibility to citizenship. Obviously, if the legislature determines that some reduction in the number of [fol. 85] persons eligible to hunt and fish is desirable, it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so. This is a logical, established, and reasonable method of classifying for conservation purposes, and the existence of facts



supporting the legislative judgment is presumed. In view of the application of the presumption of constitutionality to legislation of this kind, and because of the broad powers of the legislature in regard to the ownership, regulation and protection of wildlife, it may not be said that the refusal of the state to allow aliens ineligible to citizenship in the United States to take, or assist in the taking of, fish for private use is so palpably arbitrary as to deny such aliens constitutional guarantees. The broad ground of attack that section 990 violates Takahashi's rights under the treaty between the United States and Japan is entirely without merit, for that treaty was abrogated on January 26, 1940. (See, *People v. Oyama, supra*, p. 167.)

Takahashi contends, however, that section 990 is unconstitutional because it was enacted for the purpose and administered in a manner to discriminate against persons, including petitioner, solely because of his race. He points to the statute as it stood before the 1945 amendment and claims that the same group was singled out in different [fol. 86] terms. Certain legislative reports and articles are referred to. But Takahashi has not established with any certainty that the legislature intended to discriminate against the Japanese by enacting the 1945 amendment to section 990. Certainly such discrimination does not appear upon the face of the amendment. All of the races ineligible to citizenship are included, and no one group in particular is singled out.

Prior to the 1945 amendment, section 990 expressly excluded alien Japanese, but this section was changed to exclude persons ineligible to citizenship. However, this does not conclusively show that the 1945 amendment was intended to be a continuance of the exclusive ban on alien Japanese by description rather than by name. Just as reasonably it may be said that the history of the 1943 and 1945 legislation shows a legislative desire to avoid the possibility of Japanese racial discrimination by extending the prohibition to all persons within a given class. And the fact that the legislature applied the phrase "ineligible to citizenship" to other subjects covered in the same chapter, including sport fishing and hunting, indicates that there was no intention to discriminate against alien Japanese commercial fishermen.

Nor do the reports referred to in Takahashi's briefs point unerringly to unwarranted discrimination. The senate fact-finding committee reported merely that because the statute,

as it read in 1943, might be declared unconstitutional, a change to the present form was desirable. By the amend-[fol. 87] ment, it may be inferred, the legislature desired to extend conservation measures and did not rewrite the statute for the purpose of discriminating against alien Japanese. Furthermore, such reports on their face represent the opinion of only a few of the legislative body and cannot, with any certainty, be said to express the intention of the legislature as a whole. For much stronger reasons, articles in newspapers or other unofficial publications cannot be considered as statements of legislative intent.

Takahashi contends, as justifying judicial notice, that "it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California." Although the scope of judicial knowledge has been amplified by the courts in recent years, certain limitations remain. Courts may take judicial notice of facts that are regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence. However, such common knowledge should be certain and indisputable, and the matter should be within the court's jurisdiction. (*Varcoe v. Lee*, 180 Cal. 338, 346; see, *Code Civ. Proc.*, sec. 1875; *People v. Sanchez*, 21 Cal. 2d 466; *Livermore v. Beal*, 18 Cal. App. 2d 535; 31 C. J. S., *Evidence*, secs. 6 et seq.; 10 Cal. Jur. 693.)

Can it be said with certainty that Japanese were the only aliens ineligible to citizenship who engaged in commercial [fol. 88] fishing in ocean waters bordering on California? And is the answer to this question a matter of common knowledge? The "Fish Bulletins," compiled by the Bureau of Marine Fisheries, Division of Fish and Game, Department of Natural Resources, do not include such information. And it was stipulated that the Statistician of the Bureau of Marine Fisheries does not know how many aliens ineligible to United States citizenship applied for commercial fishing licenses during the past fifteen years. At the time the 1945 amendment to section 990 was passed, the naturalization laws of the federal government prohibited Japanese, Hindus and Malaysians from becoming citizens of the United States. The 16th Census of the United States, taken in 1940, shows that California was populated by aliens other than Japanese who were also ineligible to citizenship, and it is

reasonable to assume that some of those persons were, or might desire to be, engaged in fishing as an occupation.

When the legislature acted in 1945, it did not change only the requirements in regard to commercial fishing. Sections 427 and 428, relating to hunting and sport fishing licenses, also were amended to prohibit the issuance of such licenses to ineligible aliens. If judicial knowledge is to be invoked, the intent of the legislature of 1945 in enacting the changes in chapter 181 should be gathered from the whole chapter and not alone from the section relating to commercial fishing. To follow logically the contention of Takahashi would require the further assumption of judicial knowledge that Japanese are the only ineligible aliens who hunt or fish for [fol. 89] pleasure in California. This conclusion is again open to the objection of gross uncertainty. Under these circumstances, Takahashi has not sustained the burden of showing that the challenged statute is either unconstitutional on its face, or that it has been unconstitutionally applied to him.

This conclusion is not at variance with *Macallen Co. v. Massachusetts*, 279 U. S. 620, which held that a statute imposing a tax on federal securities was void notwithstanding the designation given to the legislation. Counsel for Takahashi use the *Macallen* case as authority for their position that if the 1943 amendment to section 990 barring alien Japanese by name from fishing and hunting was unconstitutional, so is the present statute, because, since 1945, the same group is now singled out by a more general designation. But it is established by both federal and state authorities that the state may properly deny the privilege of hunting and fishing to all except its own citizens, and the record does not show that Japanese are the only ineligible aliens in this state who have hunted and fished.

Nor is *In re Ah Chong*, 2 Fed. 733, relied upon by Takahashi, controlling. In that case the court held unconstitutional an early California statute which prohibited aliens incapable of becoming electors of the state from fishing in inland state waters. This conclusion was placed upon the ground that the legislation was aimed solely at the Chinese. The statute was one of a series of constitutional provisions and legislative enactments, some of which singled out the [fol. 90] Chinese by name, directed against a particular racial group. In those early days it was commonly known that the Chinese were the only aliens in California who could

not become electors. It was thus evident from the extensive legislation and declared policy of the state, as embodied in its constitution, that Chinese were being singled out not only by name but by description. The Ah Chong case, therefore, is clearly distinguishable on its facts from the issues now before the court. Also, in striking down the statute, the court did not consider the important rules in regard to the presumption of constitutionality; nor, apparently, did the state strenuously urge, as here, that the statute was enacted for conservation purposes.

Other cases cited by Takahashi do not compel a determination in his favor. In *Abe v. Fish and Game Commission*, *supra*, the court considered only the constitutionality of Section 990 in so far as it prohibited nonresidents from bringing ashore in California fish caught on the high seas. The decision does not construe the statute in so far as it prohibits the issuance of territorial commercial fishing licenses to ineligible aliens. *Danskin v. San Diego Unified School District*, 28 A. C. 550, concerned the constitutionality of section 19432 of the Civic Center Act, which allows the governing boards of school districts to refuse the use of school buildings to "subversive elements." A majority of [fol. 91] the court held the measure unconstitutional as an interference with freedom of speech and assembly upon the ground that, although a state may withhold the use of school property, it may not impose an arbitrary and unconstitutional requirement as a condition for granting the privilege. The statute now under attack imposes no unconstitutional requirement as a condition for a privilege.

Considering the provisions of section 990 in regard to the bringing ashore of fish caught beyond coastal waters, it is well established that the state, in the exercise of its police power may regulate and control the taking, possession and sale, or transportation of fish and game. This principle is applicable to sea products caught upon the high seas beyond the three-mile limit of state jurisdiction and sought to be brought into or transported over portions of the state which have been subjected to statutory regulations affecting the taking, possession, and sale of fish and other marine products. (*Johnson v. Gentry*, 220 Cal. 231; *Svenson v. Engelke*, 211 Cal. 500; *Ex parte Maier*, *supra*; *Silz v. Hesterberg*, 211 U. S. 31, 40; *Geer v. Connecticut*, *supra*; *Van Camp Sea Food Co. v. Dept. of Natural Resources*, 30 Fed. (2d) 111; *In re Deininger*, 108 Fed. 623.)



This rule is not violative of the federal government's interstate commerce power, (*Ex parte Maier, supra*, p. 484; *Geer v. Connecticut, supra*, p. 534; *Silz v. Hesterberg, supra*, p. 43; *Van Camp Sea Food Co. v. Dept. of Natural Resources, supra*, p. 113.) The reason for upholding such [fol. 92] a regulation or prohibition was stated in *Van Camp Sea Food Co. v. Department of Natural Resources, supra*, where the court said: "We entertain no doubt as to the validity of such restriction on or qualification of the use to be made of the fish, because it tends to their protection and conservation as much as does a limitation on the right to sell game or ship it to points without the state . . . the state has the right to limit or qualify the use that may be made of fish of the same species brought into the state from the high seas, in order to make effective the restriction on the use of fish taken from its own waters."

Section 1110 of the Fish and Game Code was considered in *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. 2d 56, and, in sustaining its requirements, the court adopted the following pertinent language from *Mirkovich v. Milnor*, 34 Fed. Supp. 409: "That a state has the power to enact legislation for the conservation of its fisheries is, of course, not open to question. Any law having a reasonable relation to such object and its accomplishment, and which is not unduly oppressive upon individuals must be upheld as a legitimate exercise of the state's police power without inquiry into the possible soundness of legislative judgment in the premises and without consideration for possible individual hardships."

"The insurmountable difficulties attendant upon policing the waters of the state from the coast to the imaginary three mile limit, wherever fishing operations occur; the impossibility of distinguishing fish taken in state waters from those taken from without, or between vessels fishing [fol. 93] within from those fishing beyond the state's limits; the consequent ease with which fraud and deceit might be practiced by vessels delivering fish taken from the fisheries of the state to points outside the state on the pretext of operating solely beyond the three mile limit—these considerations alone justify the provisions of section 1110 of the Fish and Game Code as a proper exercise of the police power of the State of California, having reasonable relation to the object of their enactment, and reasonably calculated

to render effective the state's power of control over the fish supply within its territorial waters.

"In *Bayside Fish Flour Co. v. Gentry*, *supra* [297 U. S. 422], the United States Supreme Court upheld the constitutionality of certain portions of the California Fish and Game Code regulating the processing within the state, for interstate commerce, of sardines taken either from the waters of the state or from beyond the state's territorial boundaries. State legislation prohibiting the possession of wild game out of season within its borders was held a valid exercise by the state of its police power for the protection of the state's own game supply, in its application to game imported from without the state . . .

"We have referred to but a few of the decisions upholding the constitutionality of state legislation calculated to effectuate the exercise by the state of its police power for the general welfare of its inhabitants. In each instance, the legislation was adjudged valid by application of the principle which governs the instant case; namely, that the state's power of control over its fish and wild game includes [fol. 94] the right to adopt any measure, not unduly oppressive to private individuals, reasonably necessary to render that control effective.'"

Applying the rule of these cases to Takahashi's situation, as the state may prohibit the transportation of salmon caught on the high seas through certain districts during a closed season (*Johnson v. Gentry*, *supra*); prohibit possession of game during a closed season even if brought from without the state (*Silz v. Hesterberg*, *supra*); prohibit the sale of trout within the state although it was lawfully caught in another state and brought into this state for the purpose of sale (*In re Deininger*, *supra*); or regulate the output of a plant processing fish caught on the high seas (*Van Camp Sea Food Co. v. Dept. of Natural Resources*, *supra*), in furtherance of its declared public policy to prohibit ineligible aliens from taking its animals *ferae naturae*, the state also may refuse to issue a commercial fishing license to aliens ineligible to United States citizenship so as to permit them to bring ashore sea products at any point in the state for the purpose of selling the same in a fresh state. Section 990 of the Fish and Game Code as it stood at the time of the decision of *Abe v. Fish and Game Commission*, *supra*, required a license of every person who assisted in the bringing of fish caught on the high

seas into this state, for the purpose of selling the same in a fresh condition, and limited the issuance of such license to persons who had continuously resided in the United States for a period of one year. The statute in that form rested upon no reasonable basis for the prohibition. The present [fol. 95] provision prohibits the bringing of fish ashore in California in the furtherance of an established and legitimate policy in regard to the distribution and conservation of the common property of the state.

The original and amended judgments are, and each of them is, reversed with directions to enter judgment for the commission and its members.

Edmonds, J.

We Concur: Shenk, J., Schauer, J., Spence, J.

[fol. 96]

#### DISSENTING OPINION

I dissent.

The problem involved in this case is whether the state may by statute exclude aliens who are residents of the state from fishing in the waters thereof when all other persons are permitted to do so. Specifically, in the instant case, the statute not only discriminates against aliens solely upon the basis of alienage but goes further and excludes only certain classes of aliens, namely, those who are ineligible to citizenship. From a broader view point, inasmuch as the fishing involved is commercial fishing, an age old means of livelihood, the issue is whether an alien resident may be excluded from engaging in a gainful occupation—from working—making a living.

A mere statement of the problem should compel an answer favorable to the alien if there is any security in our constitutional guarantees. We must assume that the alien is in this country properly. The federal government has chosen to permit his entry and residence here. That course having been adopted, settled principles of constitutional law, require that the alien be accorded the right to work, [fol. 97] engage in commerce and otherwise become a useful member of the crew who pulls his oar in the ship of state. There are several settled principles that must be remembered. The right to work—to earn a living—is secured by the constitutions, both federal and state. (James v. Marin-

ship, 25 Cal. 2d 721.) The equal protection principle of the constitution shelters aliens as well as others. As said in *Truax v. Raich*, 239 U. S. 33, 39: "The question then is whether the act assailed [a state statute requiring employers to employ a certain percentage of citizens in proportion to aliens] is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria [an alien], has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and *abiding in any State in the Union*. (See *Gegiow v. Uhl Commissioner*, decided October 25, 1915, ante p. 3.) *Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws*. The description—"any person within its jurisdiction"—as it has frequently been held, includes aliens. 'These provisions,' said the Court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment), 'are universal in their application, to all persons within the territorial jurisdiction, with- [fol. 98] out regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' See also *Wong Wing v. United States*, 163 U. S. 228, 242; *United States v. Wong Kim Ark*, 169 U. S. 649, 695. . . .

"It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, *does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood*. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; *Barbier v. Connolly*, 113 U. S. 27, 31; *Yick Wo v. Hopkins*, supra; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590; *Coppage v. Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal pro-



tection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless [fol. 99] restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity to earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

"It is insisted that the act should be supported because it is not 'a total deprivation of the right of the alien to labor'; that is, the restriction is limited to those businesses [fol. 100] in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of twenty per cent. of his employees. *But the fallacy of this argument at once appears. If the State is at liberty to treat the employment of aliens as in itself a peril requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective.* *Otis v. Parker*, 187 U. S. 606, *Silz v. Hesterberg*, 211 U. S. 31; *Purity Co. v. Lynch*, 226 U. S. 192. If the restriction to twenty per cent. now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less. We have nothing before us to justify the limi-

tation to twenty per cent. save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only ten per cent. of the employees to be aliens or even a less percentage, or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly. (*St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 207; *McLean v. Arkansas*, 211 U. S. 539, 551; *Miller v. Wilson*, 236 [fol. 101] U. S. 373, 384); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the State's power of excluding aliens from employment if the principles underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for as we have said it relates to every sort. *The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law.*" [Emphasis added.] And the resident aliens are protected in their person and property. ". . . aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility." [Emphasis added.] (*Fong Yue Ting v. United States*, 149 U. S. 698, 724.) (See, also, *Terrace v. Thompson*, 263 U. S. 197.)

There is no reason why aliens ineligible to citizenship may be placed in a class by themselves, at least as long as they are residents of the state. The several states have no power to exclude aliens as such from their borders. (3 C. J. S. Aliens, sec. 33(c); 2 Am. Jur. Aliens, secs. 70, 73; *Rottschaefer on Const. Law*, p. 375.) Therefore, they cannot be excluded from residence here. Being required to accept them as inhabitants it must accord them the security [fol. 102] ties afforded others. The only basis for the classification suggested by the majority opinion is that, in

furtherance of conservation of natural resources (fish and game), "[Where] the legislature determines that some reduction in the number of persons eligible to hunt and fish is desirable, it is *logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so*. This is a logical, established, and reasonable method of classifying for conservation purposes, and the existence of facts supporting the legislative judgment is presumed." [Emphasis added.] I can see no logic in depriving resident aliens, even though they are not eligible to citizenship, of the means of making a livelihood, including the pursuit of commercial fishing. They are lawfully inhabitants and residents of the state. Even if it be assumed that non residents, both alien and citizens of the United States, may be excluded from game and fish on the theory that such resources belong to the people of the state, the fact remains that resident aliens are a part of the people—the inhabitants and residents of this state. Because some believe that aliens should be punished by such a penalty is no basis for a reasonable classification. There is no sound basis for the argument that because the fish and game belong to the people of the state, the taking of them may be prohibited to all, and that with such a broad power any group of people may be arbitrarily excluded from the right [fol. 103] to take any portion thereof. On the basis of that reasoning the Legislature could validly prohibit persons ineligible to citizenship from using the highways. They belong to the state and the traffic hazards would be less if fewer people were using them. The same is true of the use of the parks, schools and other public buildings and places. It could be argued that they are over crowded and the more people using them the greater the cost to the public, all to the diminishment of the resources of the state natural or otherwise. While the state may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection principle of all meaning. If aliens are to be given equal protection, and they must, then to put them all in a class by themselves is to refute the very premise of the doctrine. Manifestly there is no rational basis for the classification. When the lack of a proper ground is patent on the face of legislation, proof of its lack of rationality is unnecessary. Suppose a statute declared



that red headed persons could not engage in certain occupations. Plainly a red head could not prove there was no possible reason why the public welfare is more jeopardized by having red heads than others in those callings. He would simply say all that any one could say: "That such a classification is pure nonsense," and there is not a court in the land that would not agree with him.

The denial to resident aliens of equal protection of the [fol. 104] laws guaranteed other residents of the state has been accomplished by piecemeal methods. They have been denied the right to engage in first one occupation and then another. It cannot be doubted that a sweeping provision prohibiting them from engaging in any occupation whatsoever would be held invalid. (*Truax v. Raich*, supra.) The onslaught by the "one at a time" method is fast achieving the same sweeping result. (See, 17 N. Y. Univ. L. Q. Rev. 242; 18 id. 483; 16 A. B. A. J. 113; 22 Minn. L. Rev. 137; 39 Cal. L. Rev. 1207.) One of the objectives of the Constitution of the United States, and particularly the amendments thereto, is to protect minorities. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that "No state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." The words, "any person," includes an alien. (*Truax v. Raich*, supra.) Any rational application of this provision to statutes such as the one here involved must result inevitably in striking down such statutes as being in clear contravention of this provision. To permit such a statute to stand is destructive of the fundamental concept upon which that provision is based.

Even if we assume that aliens as such may be excluded from some vocations or pursuits yet *there is no conceivable basis for discrimination between different classes of aliens*. In the instant case *not all aliens* are shut out of commercial fishing. It embraces only those "ineligible to citizenship." [fol. 105] Other aliens may follow that enterprise. Thus we have at least one complete answer to the proposition that because the fish are owned by the people of the state (people being used in the sense of a citizen of the state and aliens are not citizens) all non citizens may be excluded from taking the fish. That reasoning requires the exclusion of *all* aliens. It furnishes no justification for excluding some aliens and not others. The majority opinion suggests no possible basis for such classification and I do not believe



there is any. Such a classification is based upon a mere ipse dixit and nothing more. The total absence of any rational foundation for such a classification is aptly illustrated by Dudley O. McGovney, Professor of law, University of California, when he states; "Before stating with more precision the scope of rights denied to 'ineligible aliens' by these laws, let us look at their racial operation. Aliens of the brown or Malay race, except Filipinos of the same race, and aliens of the yellow or Mongolian race, except Chinese of the same race, are denied rights which aliens of the white or Caucasian race, aliens of the black or Negro race, and aliens of the red or American Indian race are permitted to enjoy without limitation. Thus eligibility of aliens to possess these particular rights follows a very queer pattern, or rather, is patternless, like a crazy quilt if they are Filipino aliens or Chinese aliens.

"There may also be some patches whose race or color is dubious. These are aliens of races indigenous to British [fol. 106] India, called Hindus in the popular parlance of Americans. When naturalization was confined to white and Negro aliens, the Supreme Court held that Hindus are neither, but surely they are not of the red, yellow or brown races. Whatever their race, dark Hindu patches are included in the crazy quilt.

"The patternless craziness does not end there. Even an alien whose blood is seven-sixteenths Japanese or Korean may [enjoy equal protection of the laws] . . . if the other nine-sixteenths is wholly of the red, black, or white race, or Hindu, or Chinese, or Filipino, or a combination of any or all of these. So may any alien who is seven-sixteenths Malay if the rest of his blood is wholly of a qualifying kind or a combination of qualifying kinds. The fraction of seven-sixteenths is taken as an example. The actual rule is that if eligible blood preponderates, however slightly, the alien is eligible to acquire real property in California. Here we have the possibility of patches of intermediate color. On the other hand if Mongolian blood other than Chinese preponderates in the veins and arteries of an alien, or Malay blood other than Filipino predominates, that alien may not get into the quilt." (35 Cal. L. Rev. 7, 9.)

In applying the equal protection provision of the Fourteenth Amendment to Aliens, the United States Supreme Court has drawn distinctions which, when applied to the instant statute, must render it invalid. Assuming the

soundness of those distinctions for the sake of precedent [fol. 107] alone, and applying them here, it appears that aliens may be shut out of the pool hall business (*Clarke v. Deckebach*, 274 U. S. 392), public employment (*Heim v. McCall*, 239 U. S. 173), and the taking of game as a sportsman (*Patson v. Pennsylvania*, 232 U. S. 138). Those cases may be distinguished on various grounds: (1) In all of them the exclusion statutes under consideration included *all* aliens and not merely those ineligible to citizenship as is true of the statute here involved. (2) They did not concern the problem of a "common employment" from which the alien cannot be debarred. So says the United States Supreme Court in *Truax v. Raich*, *supra*. Commercial fishing with which we are dealing is a common pursuit with a long historical background. (3) The pool room business (dealt with in the *Clarke* case) has long been the subject of especially severe regulation, and it was on that basis the court held the prohibition as to aliens valid, stating at page 397: "The *admitted* allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this Court took judicial notice in *Murphy v. California*, 225 U. S. 623. The regulation or even prohibition of the business is not forbidden. (Citation) The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business." [Emphasis added.] The court stressed the proposition that aliens cannot be discriminated against upon an "irrational" basis. Clearly, there is no rational basis for a distinction between aliens who are eligible and those who [fol. 108] are ineligible to citizenship. Such aliens when engaged in commercial fishing are not in a business intrinsically harmful to the public. (4) The public employment present in the *Heim* case was based upon the theory that the state may hire whom it pleases as its employees. This is clearly distinguishable from a state law forbidding a certain class of aliens from seeking a livelihood in a common occupation.

The cases holding valid alien land laws (see, *Terrace v. Thompson*, 263 U. S. 197; *People v. Oyama*, 29 A. C. 157) are expressly distinguished from the case at bar. In distinguishing *Truax v. Raich*, *supra*, the United States Supreme Court states in *Terrace v. Thompson*, *supra*, 221: "In the opinion [*Truax v. Raich*] it was pointed out that the legislation there in question *did not relate to the devolu-*

*tion of real property but that the discrimination was imposed upon the conduct of ordinary private enterprise covering the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure.*

*"In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of [fol. 109] owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself." [Emphasis added.] Assuming the soundness of that distinction and the alien land law cases, here we have a common occupation or calling "commercial fishing," and hence the Truax case controls. "Fishing was one of man's earliest sources of food supply and it is still one of his most important means of livelihood." (Encyclopaedia of the Social Sciences, Vol. III, p. 266.)*

*Finally, highly persuasive arguments may be made that the law in the instant case is aimed solely at Japanese in an obvious discrimination against a particular race, in spite of the fact that that race is not mentioned by name in the statute, by reason of the historical background of alien legislation and court decisions. (See, 35 Cal. L. Rev. 7, 51.) It is settled that such legislation is invalid. (See, Yick Wo v. Hopkins, 118 U. S. 356; Yu Cong Eng v. Trinidad, 271 U. S. 500.)*

*In my opinion the learned trial judge was right in granting petitioner a peremptory writ of mandate and the judgment should therefore be affirmed.*

Carter, J.

We concur: Gibson, C. J.; Traynor, J.

[fol. 110] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Los Angeles—No. 19835

On Appeal from the Superior Court in and for the County of Los Angeles

(Superior Court No. 513869)

TORAO TAKAHASHI, Petitioner and Respondent,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTAIN and WILLIAM SILVA, as Members thereof, Respondents and Appellants.

### JUDGMENT

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, It is Ordered, Adjudged, and Decreed by the Court that the Original and Amended Judgments of the Superior Court in and for the County of Los Angeles, in the above entitled cause, be and the same are hereby reversed with directions to enter judgment for the commission and its members.

Appellants to recover costs on appeal.

And the Attorneys for the respective parties having filed their stipulation in due form that the remittitur herein shall issue forthwith, it is hereby ordered that said remittitur issue forthwith.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 17th day of October, 1947, and of order that remittitur issue forthwith entered November 6, 1947, now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 6th day of November, A. D. 1947.

William I. Sullivan, Clerk. By L. F. White, Deputy.  
(Seal.)

[fol. 111] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 112] IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947. No. —

TORAO TAKAHASHI, Petitioner,

vs.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as Members thereof.

STIPULATION AS TO RECORD

It is hereby stipulated between the attorneys for the parties in the above-entitled action pursuant to Rule 38 (8), Rules of the Supreme Court of the United States, that the following portions of the Record heretofore certified to this Court by the Clerk of the Supreme Court of the State of California, may be omitted in the printing:

Volume I, (Clerk's Transcript):

Cover Page, Index, Pages 4, 5, 6, 10, 13, 19, 24, 25, 28, 30, 31, 32, 42 and 43.

Volume II (Supplemental Clerk's Transcript)

Cover Page, Index, Pages 9, and 12.

A. L. Wirin & Fred Okrand, by Fred Okrand, Attorneys, for Petitioner.

Fred N. Howser, Attorney General. By Ralph W. Scott, Deputy Att'y Gen., Attorneys for Respondents.

Dated: November 7, 1947.

[fol. 113] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5454)



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CHARLES ELMORE MURPHY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947.

**TORAO TAKAHASHI, Petitioner,**

v.

**FISH AND GAME COMMISSION, LEE F. PAYNE, as Chair-  
man-thereof, W. B. WILLIAMS, HARVEY E. HASTAIN,  
and WILLIAM SILVA, as members thereof.**

**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF CALIFORNIA.**

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1947.

No. ....

**TORAO TAKAHASHI, Petitioner,**

v.

**FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as members thereof.**

**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF CALIFORNIA.**

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of California entered on October 17, 1947 (R. 54), reversing the original and amended judgments of the Superior Court of California for the County of Los Angeles (R. 6, 7, 21), and directing that judgment be entered for the respondents (R. 54).

### OPINIONS BELOW.

The memorandum of opinion in the Superior Court (R. 11-18) is not reported. The opinions in the Supreme Court of California (Opinion, R. 30; Dissenting Opinion, R. 45) are reported in 30 Advance California Reports 723, 185 Pac. (2d) 805.

### JURISDICTION.

The judgment of the Supreme Court of California was entered October 17, 1947 (R. 54). It ordered that the judgments of the Superior Court be and the same are hereby reversed with directions to enter judgment for the commission and its members." (*Ibid*). The constitutional issues here presented were urged in the trial court (R. 2, 11-18) where they were sustained (R. 6, 7, 21) and in the court below (R. 30-53) where they were overruled (R. 54). The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended.

### QUESTIONS PRESENTED.

Section 990 of the Fish and Game Code of California prohibits the issuance of commercial fishing licenses to aliens ineligible to citizenship. Petitioner is a Japanese alien, denied a license because of the statute. The questions presented are:

1. Whether Section 990 does not, on its face deprive petitioner, an alien of the Japanese race, of the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution.
2. Whether Section 990 is not, in its purpose and effect, a racist statute, directed solely against Japanese aliens, and thus a denial to petitioner of the equal protection of the laws and of due process of law.



3. Whether Section 990 is not invalid because of conflict with Federal authority over, and federal policy with respect to, fisheries on the high seas and on coastal waters.

#### **STATUTE INVOLVED.**

The Statutory provision involved is Section 990 of the Fish and Game Code of California, as amended, (Stats. 1945, Ch. 181) which reads as follows:

"990. Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state shall procure a commercial fishing license.

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license may be issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship."

#### **STATEMENT.**

On June 7, 1946, Torao Takahashi filed an amended petition for a writ of mandamus in the Superior Court of the State of California for Los Angeles County (R. 1, 6). The respondents were, and are in this Court, the California Fish and Game Commission and the chairman and members thereof (R. 2). The allegations of the amended petition may be summarized as follows:

Takahashi was born in Japan, but was a resident of Los Angeles, California from 1907 until 1942, when he

was evacuated by military order from California along with others of Japanese ancestry. Between 1915 and the time of his evacuation he was engaged in the occupation of commercial fishing on the high seas. During that period he received annually, upon application, a commercial fishing license from the respondent Fish and Game Commission (R. 1, 6).

In October, 1945, upon the termination of the military exclusion orders, Takahashi returned to California to resume his former occupation. He is in all respects qualified to obtain a commercial fishing license except that he is of Japanese ancestry. Respondents have refused to issue him such a license because of the provisions of Section 990 of the Fish and Game Code, *supra*, and because he is of Japanese ancestry. Takahashi has no other occupation except that of commercial fishing, and since his return to California he has been unable to secure other employment.<sup>1</sup>

Respondents filed both an answer and a general demurrer (R. 3-4). The demurrer was overruled and the trial court, finding the only issue to be one of law (R. 12), ordered the peremptory writ of mandate to issue, thus directing the Commission to issue petitioner a commercial fishing license authorizing him to bring ashore in California fish caught by him in the high seas for fresh sale (R. 7). Subsequently, the judgment was amended so as to require respondents to issue a general

<sup>1</sup> Allegations that Takahashi's two sons and two sons-in-law had served in the United States Army, three of them overseas, and that one had received a Purple Heart and an Oak Leaf Cluster for service in the Air Corps overseas (R. 1-2), were struck by the Superior Court (R. 6) at the motion of respondents (R. 4-5). Struck, also, was the allegation that Takahashi had arrived in the United States legally and was a lawful resident of Los Angeles (R. 1, 4-5, 6).

commercial fishing license without limitation (R. 21).

*The decisions below.* The Superior Court based its judgment for petitioner on two distinct grounds. First, it held that to deny a resident of a State, solely because he is an ineligible alien, a commercial fishing license is to deny the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This denial, the court said, could not be justified as the regulation by the State of the disposition of its own property, but was rather an unlawful limitation of the right to pursue a private and lawful occupation (R. 16). Second, it held that the legislative history of this California statute makes clear that its language is but a "thin veil used to conceal" a "purpose \* \* \* too transparent" to eliminate Japanese aliens from the right to a commercial fishing license (R. 16-17). Such discrimination, "patently hostile", it found to be without any reasonable basis (R. 17-18).

The Supreme Court of California, three of the seven justices dissenting, reversed the Superior Court. The majority was of the view that the legislature has almost unlimited powers to regulate hunting and fishing within its own borders and to deny the right to engage in these activities to other than its own citizens as it sees fit (R. 36-38). Moreover, relying on the decision of this Court in *Terrace v. Thompson*, 263 U. S. 197, and on its own decision in *People v. Oyama*, 173 Pac. (2d) 794, (now pending for decision in this court, October Term 1947, No. 44), which concerned prohibitions against ownership of land by classes of aliens, the court took the position that the ineligible alien classification is a reasonable one for conservation purposes (R. 38). The majority of the court did not feel that it had been established that the statute was racial in intent or ap-



6

plication (R. 39-42). Finally, the court held that, to the extent that the statute applies to the bringing ashore of fish caught beyond the coastal waters, it is reasonably calculated to render effective the State's power of control over the fish supply within its territorial waters (R. 42-45).

The dissenting opinion of Justice Carter (with whom Chief Justice Gibson and Justice Traynor concurred) saw the issue primarily as whether an ineligible alien resident "may be excluded from engaging in a gainful occupation—from working—making a living" (R. 45). Under *Truax v. Raich*, 239 U. S. 33, and *Yick Wo v. Hopkins*, 118 U. S. 356, they believed that there could be but one answer. They could find no reasonable basis for denying resident aliens the right to make a livelihood from commercial fishing and no conceivable basis for discriminating between classes of aliens (R. 46-50). "Assuming the soundness of . . . the alien land law cases" (R. 53), the minority distinguished them from the instant case as being related to the devolution of real property and not to earning a living in a common occupation (R. 52-53). Finally, "highly persuasive arguments" may be made that the legislation in question is actually aimed solely against Japanese and is hence invalid as racist in purpose (R. 53).

On October 17, 1947, the Supreme Court entered its judgment, that the judgments of the Superior Court "be and the same are hereby reversed with directions to enter judgment for the commission and its members" (R. 54).

50



### **SPECIFICATION OF ERRORS TO BE URGED.**

The Supreme Court of California erred:

1. In failing and refusing to hold that Section 990 of the Fish and Game Code of California did not, on its face, constitute a denial to petitioner, an alien of the Japanese race, of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the Constitution.

2. In failing and refusing to hold that Section 990 is not, in its purpose and in its necessary effect, a racist statute directed against aliens of Japanese origin, and thus a denial to them, including petitioner, of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment.

3. In failing and refusing to hold that Section 990 is not invalid because of conflict with Federal authority over, and federal policy with respect to, fisheries on the high seas and on coastal waters.

4. In reversing the decision of the Superior Court.

### **REASONS FOR GRANTING THE WRIT.**

#### **I.**

SECTION 990 OF THE FISH AND GAME CODE OF CALIFORNIA, ON ITS FACE, DEPRIVES TORAO TAKAHASHI, AN ALIEN INELIGIBLE TO CITIZENSHIP, OF THE EQUAL PROTECTION OF THE LAWS AND OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Section 990 of the Fish and Game Code of California, as amended, *supra*, requires a commercial fishing license not only by those who fish in the waters of California but also by those who fish anywhere and who bring

their catch ashore at any point on the coast of California for sale. Torao Takahashi, born in Japan, but a resident of California for almost forty years, earned his living from 1915 to 1942 by fishing on the high seas. During all that 27 years he was issued commercial fishing licenses. Since Takahashi's return to California from military evacuation, he has been unable to resume his former occupation because of the 1945 amendment to the Fish and Game Code (Section 990, *supra*). This amendment, on its face, is contrary to the Fourteenth Amendment of the Constitution of the United States. It is even more clearly in conflict with the provisions of Section 41 of Title 8, U. S. C.; *Virginia v. Rives*, 100 U. S. 313, 317. We believe that it must certainly be stricken down.

This statute expressly discriminates against aliens. But it does more than that: it divides the alien population into two groups, and denies commercial fishing privileges to a minority within a minority—the aliens ineligible to citizenship. But ignoring for a moment the double discrimination, the issue, as the minority below stated it (R. 45):

“is whether an alien resident may be excluded from engaging in a gainful occupation—from work—making a living.”

On that issue the prior decisions of this Court leave no doubt as to the answer. Thirty years ago, in *Truax v. Raich*, 239 U. S. 33, it said (at p. 41):

“It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers'*

*Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; *Barbier v. Connolly*, 113 U. S. 27, 31; *Yick Wo v. Hopkins*, *supra*; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590; *Coppage v. Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of equal protection of the laws would be a barren form of words."

—It is no answer to say, as the State and the majority of the court below argue, that fish are the property of the State; that in the interest of conservation it may limit the right to fish; and that the reduction in the number of persons who may fish has a reasonable relationship to the object of conservation of fish and hence is within the police power of the State (R. 32, 36-43). The question remains whether the State may single out aliens from bringing into California for sale fish caught on the high seas outside its own territories. The question, however, answers itself; such a restriction patently amounts to an unreasonable classification inconsistent with the equal protection of the laws, and a deprivation of the due process of law required by the Fourteenth Amendment. *Truax v. Raich*, *supra*; *Truax v. Corrigan*, 257 U. S. 312. Certainly, under that Amendment, a power to control does not mean the power to control arbitrarily. No one would say that the State could preserve its resources by denying licenses to fish only to red-heads.

The classification established by the State discriminates not only against aliens, however, arbitrary as that would be. Here, as already pointed out, the discrimination is against a very special limited class of aliens—those ineligible for citizenship. The large numbers of non-resident aliens may carry on the occupation

denied Takahashi. German, British, and Russian aliens domiciled anywhere in this country, in or out of California, or for that matter, in or out of the United States, may make their living fishing on the high seas and selling their catches in California. Only ineligible aliens—resident or non-resident of California—are denied this privilege. Such a discrimination is baseless on its face, and the suggestion that it can be supported on the theory that the State can reduce the number of fishermen for conservation purposes, and that “it is logical and fair that aliens ineligible for citizenship shall be the first group to be denied the privilege” (R. 38) does no more than confirm its patent unconstitutionality. Takahashi is a resident of the State of California. If participation in the bounty of the State may be limited, a resident of California, with obligation to the State, has far more right to participate in it than a German alien who is a resident of another State or even of Germany.

Nor may the State obtain support from *Terrace v. Thompson*, 263 U. S. 197, upon which the majority below relied (R. 38). This court has been asked to reconsider, limit, and—if necessary—reverse the *Thompson* case in *Oyama v. California*, October Term 1947, No. 44, now pending before the Court for decision. In any event, it held at most that eligibility for citizenship is a reasonable classification for purposes of restricting the devolution of real property. There Mr. Justice Butler took pains to distinguish *Truax v. Raich*, *supra*, pointing out that in *Truax v. Raich* the legislation (p. 221)

“did not relate to the devolution of real property, but that the discrimination was imposed upon the conduct of ordinary private enterprise covering



the entire field of industry with the exception of enterprises that were relatively very small. It was said that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure."

As the minority of the court below said (R. 53):

"Assuming the soundness of that distinction and the alien land law cases here we have a common occupation or calling 'commercial fishing,' and hence the *Truax* case controls. 'Fishing was one of man's earliest source of food supplies and it is still one of his most important means of livelihood.'"

Finally, it should be noted that the court below conceded that the State's power to regulate the bringing ashore to California for sale fish caught on the high seas is not a direct or express power but rather a "necessary" one to make effective its power to control its own fisheries (R. 42-45). California clearly may exercise no power over fishing on the high seas; indeed, as indicated below in Point III, the extent of its power over fishing on the coastal waters is far from clear. Thus, no matter what may be the scope of its authority with respect to its inland waters (which are not here involved), there is even less basis, if that be possible, for any presumption as to the validity of the State's classification for licensing fishermen to fish in an area which is not a part of its public domain.

## II.

SECTION 990 OF THE FISH AND GAME CODE OF CALIFORNIA IS ANTI-JAPANESE AND RACIAL IN PURPOSE AND HENCE DEPRIVES TORAO TAKAHASHI, AN ALIEN OF JAPANESE RACE, OF THE EQUAL PROTECTION OF THE LAWS AND OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The minority of the court below, although finding the statute to be unconstitutional on its face, added, in addition (R. 53):

"Finally, highly persuasive arguments may be made that the law in the instant case is aimed solely at Japanese in an obvious discrimination against a particular race, in spite of the fact that that race is not mentioned by name in the statute."

The Superior Court made this an express ground of decision, stating (R. 17) that the words "aliens ineligible to citizenship" were no more than a

"thin veil used to conceal a purpose being too transparent \* \* \* to eliminate alien Japanese from those entitled to a commercial fishing license by means of a description rather than by name."

A brief reference to the legislative history of the statute, and some of the facts with respect to aliens in California, will demonstrate the accuracy of the conclusion of the Superior Court.

Section 990 of the California Fish and Game Code was first codified in 1933 (Stats. 1933, ch. 73; based on Stats. 1909, ch. 197, as amended). In 1943 the statute was amended to provide, in so many words, that alien Japanese alone could not receive commercial fishing licenses. It then read (Stats. 1943, ch. 1100):

"A commercial fishing license may be issued to any person other than an alien Japanese."

In 1945 this statute was considered further by a committee of the California Senate. *Report of the Senate Fact-Finding Committee on Japanese Resettlement, May 1, 1945*. That Committee reported as follows on the subject of "Japanese Fishing Boats" (pp. 5-6):

"The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional; on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute."

A few months later, Section 990 was revised to read the way it reads today, with the phrase "any person other than a person ineligible to citizenship" substituted for the phrase "any person other than an alien Japanese"—precisely as recommended by the Senate Committee.

No one can reasonably doubt that the Senate Committee was concerned only with the Japanese, and how the "menace" of the Japanese fishing boats might be eliminated; the whole Report was on the Japanese "problem".<sup>2</sup> Nor can one reasonably doubt that the same concern motivated the California legislation. The

<sup>2</sup> A copy of the Report of May 1, 1945, has been lodged with the Clerk in connection with *Oyama v. California*, October Term, 1947, No. 44.

phrase "aliens ineligible for citizenship" has in fact become, in California at least, merely a synonym for "Japanese", and a convenient circumlocution by which to evade constitutional limitations. In the past, a number of groups of aliens were ineligible to United States citizenship; now, changes in the naturalization laws have left the restriction applicable—for practical purposes in California—to but one racial group.

Census figures, and other statistics subject to judicial notice, indicate the practical situation. In 1940, apart from the Japanese, the total of *citizens and aliens* in California of racist groups not eligible for citizenship was 2,962. *Census of 1940, Characteristics of the Population*, Part I, Table 22. The census gives no figures for aliens and citizens separately, in this group. In the same year, *citizens and aliens* of Japanese origin or descent were 93,717, of whom but 33,509 were aliens. H. Rep. No. 2124, 77th Cong., 2d Sess. (1942) pp. 91, 96. If the same ratio of citizens to aliens applies to the ineligible aliens other than Japanese, as it probably does, there are no more than 1000 people other than Japanese aliens out of California's 6,907,387 who suffer when the California legislators decide that a "better" definition of "Japanese"—at least a more sophisticated one—is "aliens ineligible to citizenship." In the whole United States, 98 per cent of the ineligible aliens were Japanese.

Moreover, so far as commercial fishing is concerned, it is not clear that *anyone* other than Japanese aliens suffers when the more sophisticated definition is used. In 1935—a prewar year—the Bureau of Commercial Fisheries of California, in its annual report (Fish Bulletin No. 49) classified the 6007 licensees by nativity. Apart from Japanese, no other racial group ineligible to citizenship appears in the table (p. 143). Possibly



there are some in the "scattered representatives of other nations, totaling 89 fishermen", but equally possible, there are not. At most there could be but 89.

Patently, therefore, the legislation is anti-Japanese both in purpose and in effect. *Yu Cong Eng v. Trinidad*, 271 U. S. 500. As such, it is instantly suspect. *Korematsu v. United States*, 323 U. S. 214, 216. It meets neither the rigorous standards of property to which legislation of this type must conform, *Thomas v. Collins*, 323 U. S. 516, 527, 532, nor the normal standards of reasonableness of statutory classification, *Yick Wo v. Hopkins*, 118 U. S. 356; *Buchanan v. Warley*, 245 U. S. 60. Any alleged conservation purpose becomes even more baseless when the statute is considered in its true racial light. In 1940 California's alien Japanese population numbered 33,059 out of a total population of 6,907,387. In 1941-1942, the last year when Japanese aliens could receive commercial fishing licenses from California, only 7 per cent of the alien fishermen were alien Japanese, a figure that had been constantly decreasing throughout the years. See Fish Bulletin No. 59, p. 21. Compare, for prior years, Fish Bulletin No. 57, p. 20; No. 58, p. 24. Only one rational conclusion is possible: the statute is concerned not with conservation, but with discrimination; not with saving the fish, but with saving the white fishermen. From 1943 to the present, this statute has had only one object--destroy the "menace" of the Japanese.

III. *o*

SECTION 990 OF THE FISH AND GAME CODE OF CALIFORNIA, INsofar AS IT PROHIBITS LICENSING OF PERSONS INELIGIBLE FOR CITIZENSHIP, IS INVALID BECAUSE OF CONFLICT WITH FEDERAL AUTHORITY OVER, AND FEDERAL POLICY WITH RESPECT TO, FISHERIES ON THE HIGH SEAS AND COASTAL WATERS.

The decision of the court below is bottomed upon the proposition that the state may regulate the taking of *ferae naturae* "owned" by it (R. 36-37). Accordingly, it is argued, California as "owner" may restrict the taking of fish in coastal waters, and may further restrict the landing of fish, of the same species found in coastal waters, taken on the high seas. In short, the California statute is sought to be sustained as the legitimate conservation of State-owned property.

Petitioner has already shown that, even on that assumed basis, the statute must fall. But Section 990 is invalid for another reason. It is in conflict with Federal authority over, and federal policy with respect to, the fisheries sought to be regulated.

For effective conservation, and indeed for any conservation at all, the fisheries favored by California-based vessels must be treated as a unit. Fish Bulletin No. 15 (1929) pp. 50, 62. They cannot be divided by an artificial line between the "high seas" and coastal waters. The State's own Department of Natural Resources has stated that the California commercial catch of fish comes in part from areas south of the Mexican border, north of the Oregon boundary, and westward as far as Japan. Fish Bulletin No. 57 (1940) p. 27; Fish Bulletin No. 58 (1940) p. 29; Fish Bulletin No. 59

(1944) p. 29.<sup>3</sup> One report stated, concerning the fishing grounds off the southern California coast (Fish Bulletin No. 15 (1929) p. 9):

"Although one fishery, it is arbitrarily cut into four parts by two imaginary lines drawn on the map. The boundary between the United States and Mexico when extended westward divides the area horizontally into northern and southern portions, while the three mile limit running vertically cuts a three mile strip off the eastern edge of this fishing area. The fishermen, the fish, and the ocean currents pay little attention to these lines, and the only excuse for drawing them is in such cases as involve the levying of duty or determining state and national jurisdiction."

The long history of international disputes and conventions to regulate open-sea fishing, adverted to by this Court in *United States v. California*, 332 U. S. 19, 32, need not be repeated in detail at this point. More important here is the inadequacy of controlling fisheries by states on any theory of jurisdiction over coastal waters. Conservation of the Alaskan salmon fishery was found, in 1938, to depend on the uncertainties of a

<sup>3</sup> California Marine Fisheries officials, proud of the range of the California tuna boats that, by 1934, had made "Costa Rica, Panama and the Galapagos Islands . . . the common fishing grounds," (Fish Bulletin No. 44 (1935) p. 41; Fish Bulletin No. 49 (1937) p. 26) publicly regretted war-time restrictions on sailing tuna boats south of 10° N. Latitude. California, Department of Natural Resources, Division of Fish and Game, Report for 1940-1942, p. 49. Conservation studies of the sardine and mackerel fisheries have involved the release of California-tagged fish off the coasts of Mexico and Oregon, and cooperation with the fisheries departments of Canada, Washington and Oregon, and with the United States Fish and Wildlife Service. *Id.* at 37, 38; 1942-1944 Report, at 49, 50.

"gentleman's agreement" with Japan. Jessup, *The Pacific Coast Fisheries* (1939) 33 A. J. I. L. 129, 132-133. The success of the Canadian-United States halibut conservation program was likewise "threatened by the invasion of British and Norwegian fishing interests with floating refrigeration plants." *Id.* at 133. Similarly, British attempts to regulate fishing outside the three-mile limit in Moray Firth were rendered ineffective, and eventually abandoned, because of the intransigence of Norway. *Id.* at 135. And the attempt to draft a convention governing territorial waters at the international Codification Conference of 1930 failed because of inability to reconcile "territorial waters" (coastal waters) and "open sea" fishing. Daggett, *The Regulation of Maritime Fisheries by Treaty* (1934) 28 A. J. I. L. 693. Effective fishery conservation requires Federal action, either by the promotion of international convention and agreement, or by the assertion, backed by other appropriate Federal sanctions, of a preemptive right to regulate fishing in designated areas. As was stated by this Court in *United States v. California* (332 U. S. at 35):

"whatever any nation does in the open sea, which detracts from its usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such and not their separate governmental units."

However, under the doctrine of *United States v. California*, *supra*, it is highly doubtful that California may constitutionally apply Section 990 of its Fish and Game Code even in coastal waters. Compare *Toomer v. Witsell*, October Term, 1947, No. 415. In the *California* case, this Court repudiated the doctrine of coastal State "ownership" of waters beyond the mean low-tide



marks. Accordingly, fish in the coastal waters are "owned", not by California, but by the United States as a whole. Whatever jurisdiction California may assert over the taking of fish in this domain is exercised on behalf of the people of the United States. California legislation restricting the taking of fish in coastal waters must, therefore, be framed in accordance with national policy. Although *United States v. California* expressly preserved the power of the coastal States to exercise reasonable police power and, in particular, to regulate and conserve fish in coastal waters in the absence of overriding federal regulations, State jurisdiction in coastal waters is exercised, not by right, but by sufferance, in trust for the nation. A fair reading of the *California* case necessitates the conclusion that State regulation of coastal waters is invalid where it conflicts with an established federal policy, whether or not comprehensive federal occupation of the field by statute is found. In the instant case, however, Federal action has been sufficiently comprehensive to satisfy even the more specific criteria of *Hines v. Davidowitz*, 312 U. S. 52, 68, as well as the doctrine necessarily to be drawn from the *California* case.

Federal occupation of the field begins with the Constitutional guarantees of freedom to pursue any legitimate occupation, without governmental discrimination because of race or color, as implemented by the specific language of Section 41 of Title 8, U. S. C.:

"All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security

of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The "plain object" of this statute was to make "the rights and responsibilities, civil and criminal" of all persons, and particularly of the colored races "exactly the same" as those of white citizens. *Virginia v. Rives*, 100 U. S. 313, 318. Through the mechanism of first denying a license, the California statute subjects the Japanese alien who fishes for a living to punishment, pains, penalties and exactions—in the form of criminal sanctions—not imposed upon white fishermen.

Nor have the controversies which, as noted by this Court, have "arisen among nations about rights to fish in prescribed areas," (*United States v. California*, 332 U. S. at 32) been limited to the right to fish on the high seas. They have extended to the taking of fish within coastal waters. Brief for the United States in Support of Motion for Judgment, p. 87, *United States v. California*; Jessup, *supra*, at 136. The settlements of these controversies, by international negotiation and treaty, have cut across the artificial "three-mile" line, and have not imposed racial or citizenship limitations on the right of Americans to fish. The Bering Sea Fur Seal Convention (37 Stat. 1542) governs the coastal waters of Great Britain, Japan, Russia and the United States. The North Atlantic fishery settlements open coastal waters of the United States and Great Britain to one another's nationals. Daggett, *supra*, at 701; Brief for the United States, *supra*. The 1937 Halibut Treaty with Canada (50 Stat. 1351) and the Salmon Convention of 1930 (50 Stat. 1355) have provided for regulation of fishing, on the high seas and in coastal waters,

by international commissions. Such instruments as the Halibut Treaty have sought to preserve fishing rights, not solely for American citizens, but for the "citizens and inhabitants" of the United States.

In 1945 a Presidential Proclamation announced a national policy of establishing "conservation zones", under the jurisdiction of the federal government, governing waters traditionally regarded as "coastal" as well as the "high seas". No. 2668, September 28, 1945, 10 F. R. 12304. Moreover, the Proclamation indicated that when such fisheries have been developed by nationals of more than one nation, international agreement is the appropriate medium for fishery regulation.

By international agreements the United States is also committed to a policy of non-discrimination. In Article 55c of the United Nations charter, this nation agreed to foster:

"universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

By Article 56, this nation pledged itself to take "joint and separate action" to achieve that objective.

Similarly, in the Act of Chapultepec, the United States joined with other Western Hemisphere countries in undertaking to "... make every effort to prevent ... all acts which may provoke discrimination among individuals because of race or religion."

Accordingly, the prohibition of fishing licenses to Japanese aliens—whether ostensibly in "territorial" waters or on the "high seas"—is at fatal variance with established United States policy concerning the right of access to the fisheries. This conclusion is underlined by our external policy applied to the Japanese people in

our present occupation of Japan. The new Constitution of Japan, adopted by the Japanese Government upon representations by General Douglas MacArthur's Headquarters undertakes to guarantee that (Ch. 3, Art. XIII):

"All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin."

Manifestly, therefore, to permit the State of California to forbid licenses to Japanese fishermen in water within the Federal domain is a flagrant breach of our international commitments and policy, which can only serve as a source of friction and conflict between the United States and Japan, and thwart national efforts to secure international cooperation in fishery conservation.

#### CONCLUSION.

Wherefore, the petition for a writ of certiorari to the Supreme Court of California should be granted.

Respectfully submitted,

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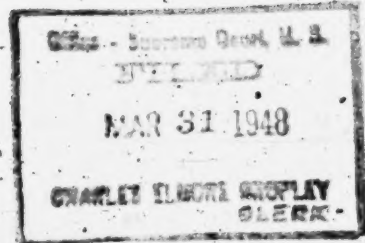
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No. 533

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1947

TORAO TAKAHASHI, *Petitioner*,

v.

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chair-  
man thereof, W. B. WILLIAMS, HARVEY E. HASTAIN,  
and WILLIAM SILVA, as members thereof.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CALIFORNIA

BRIEF FOR PETITIONER

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DEAN ACHESON,  
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March 31, 1948.





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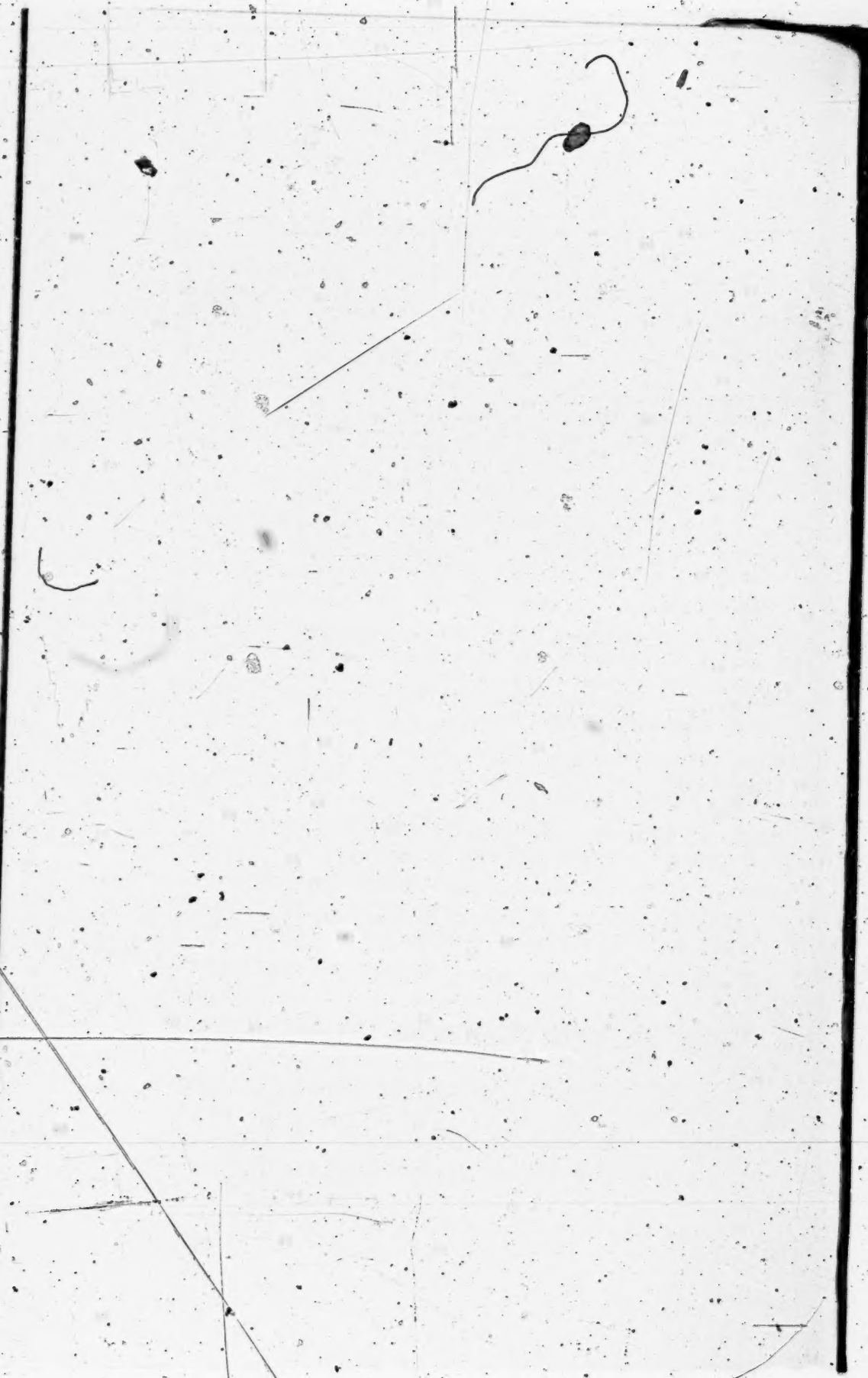
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947

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No. 533.

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**TORAO TAKAHASHI, *Petitioner,***

**v.**

**FISH AND GAME COMMISSION, LEE F. PAYNE, as Chair-  
man thereof, W. B. WILLIAMS, HARVEY E. HASTAIN,  
and WILLIAM SILVA, as members thereof.**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
CALIFORNIA**

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**BRIEF FOR PETITIONER**

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**OPINIONS BELOW**

The memorandum of opinion in the Superior Court (R. 11-18) is not reported. The opinions in the Supreme Court of California (Opinion, R. 30; Dissenting Opinion, R. 45) are reported in 30 Advance California Reports 723, 185 P. 2d 805.

**JURISDICTION**

The judgment of the Supreme Court of California was entered October 17, 1947 (R. 54). It ordered that the judgments of the Superior Court "be and the same are hereby reversed with directions to enter judgment for the commission and its members." (*Ibid*). The constitutional issues here presented were urged in the trial court (R. 2, 11-18), where they were sustained (R. 6, 7, 21), and in the court below (R. 30-53) where they were overruled (R. 54). Petition for a writ of certiorari was filed on January 16, 1948, and was granted on March 15, 1948. The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended.

**QUESTIONS PRESENTED**

Section 990 of the Fish and Game Code of California prohibits the issuance of commercial fishing licenses to aliens ineligible to citizenship. Petitioner is a Japanese alien, denied a license because of the statute. The questions presented are:

1. Whether Section 990 on its face deprives petitioner, an alien of the Japanese race, of the equal protection of the laws and due process of law in violation of the Fourteenth Amendment to the Constitution.
2. Whether Section 990, in its purpose and effect, is a racist statute, directed solely against Japanese aliens, and thus a denial to petitioner of the equal protection of the laws and of due process of law.
3. Whether Section 990 is invalid because of conflict with federal authority over, and federal standards with respect to, discrimination against aliens.

### STATUTE INVOLVED

The statutory provision involved is Section 990 of the Fish and Game Code of California, as amended (Stats. 1945, Ch. 181), which reads as follows:

"990. Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state shall procure a commercial fishing license.

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license may be issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship."

### STATEMENT

On June 7, 1946, Torao Takahashi filed an amended petition for a writ of mandamus in the Superior Court of the State of California for Los Angeles County (R. 1, 6). The respondents were, and are in this Court, the California Fish and Game Commission and the chairman and members thereof (R. 2). The allegations of the amended petition may be summarized as follows:

Takahashi was born in Japan, but was a resident of Los Angeles, California from 1907 until 1942, when he was evacuated by military order from California along with others of Japanese ancestry. Between 1915 and the time of his evacuation he was engaged in the occupation of commercial fishing on the high seas. During that period he received annually, upon application, a

commercial fishing license from the respondent Fish and Game Commission (R. 1, 6).

In October, 1945, upon the termination of the military exclusion orders, Takahashi returned to California to resume his former occupation. He is in all respects qualified to obtain a commercial fishing license except that he is of Japanese ancestry. Respondents have refused to issue him such a license because of the provisions of Section 990 of the Fish and Game Code, *supra*, and because he is of Japanese ancestry. Takahashi has no other occupation except that of commercial fishing, and since his return to California he has been unable to secure other employment.<sup>1</sup>

Respondents filed both an answer and a general demurrer (R. 3-4). The demurrer was overruled and the trial court, finding the only issue to be one of law (R. 12), ordered the peremptory writ of mandate to issue, directing the Commission to issue petitioner a commercial fishing license authorizing him to bring ashore in California for sale in a fresh state fish caught by him in the high seas (R. 7). Subsequently, the judgment was amended so as to require respondents to issue a general commercial fishing license without limitation (R. 21).<sup>2</sup>

<sup>1</sup> Allegations that Takahashi's two sons and two sons-in-law had served in the United States Army, three of them overseas, and that one had received a Purple Heart and an Oak Leaf Cluster for service in the Air Corps overseas (R. 1-2); were struck by the Superior Court (R. 6) at the motion of respondents (R. 4-5). Struck, also, was the allegation that Takahashi had arrived in the United States legally and was a lawful resident of Los Angeles (R. 1, 4-5, 6).

<sup>2</sup> The Supreme Court of California held that the amended judgment was void because entered after the trial court had lost jurisdiction of the cause even though respondents consented (R. 33-34). However, it rested its judgment of reversal, not upon any technical



*The decisions below.* The Superior Court based its judgment for petitioner on two distinct grounds. First, it held that to deny a resident of a state, solely because he is an ineligible alien, a commercial fishing license is to deny the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. This denial, the court said, could not be justified as the regulation by the State of the disposition of its own property, but was rather an unlawful limitation of the right to pursue a private and lawful occupation (R. 16). Second, it held that the legislative history of this California statute makes clear that its language is but a "thin veil used to conceal" a "purpose . . . too transparent" to eliminate Japanese aliens from the right to a commercial fishing license (R. 16-17). Such discrimination, "patently hostile", it found to be without reasonable basis (R. 17-18).

The Supreme Court of California, three of the seven justices dissenting, reversed the Superior Court. The majority was of the view that the Legislature has almost unlimited powers to regulate hunting and fishing

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consideration of the propriety of the specific relief granted, but upon a denial of petitioner's claim under the Fourteenth Amendment. Respondents argue that if, for technical reasons the statute does not authorize the specific form of license ordered by the trial court, the petitioner fails (Respondents' Brief in Opposition, pp. 7-9). But this Court is not concerned with the mechanics of licensing petitioner to fish in the waters in which he is entitled to fish, where the license is issued under a statute which purports to prevent petitioner from fishing in any waters whatsoever. That is a problem for the courts of California, and may be presented to them under a mandate from this Court remanding the case for further proceedings not inconsistent with the Court's opinion. Compare *Sipuel v. Board of Regents of University of Oklahoma*, October Term, 1947, No. 369, decided by this Court January 12, 1948; *Fisher (Sipuel) v. Hurst*, October Term, 1947, No. 325 Misc., decided February 16, 1948.

within its own borders and to deny the right to engage in these activities to other than its own citizens as it sees fit (R. 36-38). Moreover, relying on the decision of this Court in *Terrace v. Thompson*, 263 U. S. 197, and on its own decision in *People v. Oyama*, 173 P. 2d 794 (1946), reversed U. S. Sup. Ct., Oct. Term, No. 44, Jan. 19, 1948, which concerned prohibitions against ownership of land by classes of aliens, the court took the position that the ineligible alien classification is a reasonable one for conservation purposes (R. 38). The majority of the court did not feel that it had been established that the statute was racial in intent or application (R. 39-42). Finally, the court held that, to the extent that the statute applies to the bringing ashore of fish caught beyond the coastal waters, it is reasonably calculated to render effective the State's power of control over the fish supply within its territorial waters (R. 42-45).

The dissenting opinion of Justice Carter (with whom Chief Justice Gibson and Justice Traynor concurred) saw the issue primarily as whether an ineligible alien resident "may be excluded from engaging in a gainful occupation—from working—making a living" (R. 45). Under *Truax v. Raich*, 239 U. S. 33, and *Yick Wo v. Hopkins*, 118 U. S. 356, they believed that there could be but one answer. They could find no reasonable basis for denying resident aliens the right to make a livelihood from commercial fishing and no conceivable basis for discriminating between classes of aliens (R. 46-50). "Assuming the soundness of . . . the alien land law cases" (R. 53), the minority distinguished them from the instant case as being related to the devolution of real property and not to earning a living in a common occupation (R. 52-53). Finally, "highly persuasive arguments" may be made that the legislation in question

is actually aimed solely against Japanese and is hence invalid as racist in purpose (R. 53).

On October 17, 1947, the Supreme Court of California entered its judgment, that the judgments of the Superior Court "be and the same are hereby reversed with directions to enter judgment for the commission and its members" (R. 54).

The petition for writ of certiorari was filed on January 16, 1948, and was granted on March 15, 1948.

#### **SPECIFICATION OF ERRORS TO BE URGED**

The Supreme Court of California erred:

1. In failing and refusing to hold that Section 990 of the Fish and Game Code of California, on its face, constituted a denial to petitioner, an alien of the Japanese race, of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment to the Constitution.

2. In failing and refusing to hold that Section 990 is, in its purpose and in its necessary effect, a racist statute directed against aliens of Japanese origin, and thus a denial to them, including petitioner, of the equal protection of the laws and of due process of law in violation of the Fourteenth Amendment.

3. In failing and refusing to hold that Section 990 is invalid because of conflict with federal authority over, and federal standards with respect to, discrimination against aliens.

4. In reversing the decision of the Superior Court.

#### **SUMMARY OF ARGUMENT**

##### **I**

Petitioner, a resident of California, asserts a right to fish in the ocean, land his catch in California, and thus earn a living. In common with other alien Japanese,

he is now denied that right because of ineligibility to citizenship, inasmuch as such ineligible cannot obtain a license to use a fishing boat in waters subject to California jurisdiction, or to land fish in California. Petitioner seeks to fish in the open sea, where a substantial if not a major portion of the California fish catch is taken. The doctrine that a state may preserve for its own citizens fish in which it has a proprietary interest is, therefore, inapplicable. Nor can the doctrine be invoked on the theory of state ownership of coastal waters and the fish therein. *United States v. California*, 332 U. S. 19. California's legislative authority over offshore fishing springs from the special interest of coastal communities in ocean fishing as a source of livelihood, and the national interest in fish as food and industrial material. The issue is not, therefore, a state's power to limit access to property which it owns, but is whether California can lawfully deny petitioner, because of race or alienage, an ordinary means of livelihood.

## II

Petitioner's interest in earning a living by fishing gives rise to a right which California must afford the protection of equal laws. A state statute which discriminates against aliens in the right to pursue ordinary vocations violates the Fourteenth Amendment. *Truax v. Raich*, 239 U. S. 33. Even as to fish subject to California proprietorship, it would be a denial of equal protection to discriminate against alien Japanese in a commercial fishery, open to all other persons, regardless of citizenship or residence, and irrespective of the ultimate disposition within or without the State, of fish caught. California does not seek to preserve fish landed in California for its own citizens, but is willing and anxious to have such fish shipped inland in interstate



commerce. Having so permitted the taking of fish for export, California has relaxed any hold based on proprietorship, and must act in accordance with the commerce and equal protection clauses of the Constitution. *Foster Packing Co. v. Haydel*, 278 U. S. 1; *Pavel v. Pattison*, 24 F. Supp. 915 (W. D. La. 1938).

### III

The proscription of commercial fishing licenses to alien Japanese cannot be sustained as a conservation measure. California first prohibited the licensing of "alien Japanese" by a 1943 amendment to the Fish and Game Code. Stats. 1943, ch. 1100. In 1945, the phrase "alien Japanese" was changed to "ineligible to citizenship," a step advised by a California Senate committee in the hope of preserving the constitutionality of the exclusion of alien Japanese from the fisheries. Stats. 1945, ch. 181. The 1943 and 1945 amendments were adopted under the influence of war-born anti-Japanese prejudice, and represent unadulterated racism. The alien Japanese is the butt of both amendments, for the commercial fisherman who is not eligible to citizenship, other than an alien Japanese, is virtually unknown in California. No evidence can be presented of a bona fide purpose to reduce the number of commercial fishermen so as to conserve fish. In fact, the 1942 evacuation of Japanese did not cause a substantial or lasting reduction in the number of licensed commercial fishermen, nor did the California authorities desire that it should. As of 1945, California discouraged any reduction in the size of the catch, and reported the California fishery in a healthy condition.

### IV

The Federal Government exercises supreme control over foreign affairs and aliens. Federal law or treaty

for the regulation of aliens or for the protection of aliens against discrimination excludes inconsistent state laws. *Hines v. Davidowitz*, 312 U. S. 52. Federal occupation of the field begins with the constitutional guaranties and the Civil Rights Act of 1866, 8 U. S. C. Sec. 41. More recently, the Federal Government by international agreement has agreed to take joint and separate action in cooperation with other nations to remove discriminations because of such factors as race or nationality. United Nations Charter, Arts. 55, 56; Draft Declaration on Human Rights, United Nations Commission on Human Rights; Inter-American Conference on Problems of War and Peace, Mexico City, Resolution 41; Draft Declaration of the International Rights and Duties of Man, Articles XIV and XVIII before Ninth International Conference of American States, Bogotá, Colombia, March 30, 1948.

## ARGUMENT

### I

PETITIONER ASSERTS A RIGHT AND DOES NOT SEEK A "PRIVILEGE" FROM THE STATE OF CALIFORNIA

Petitioner asserts his right to engage in the ancient occupation of fishing in the ocean and bringing his catch to shore. He makes no claim to take fish in which the State of California has or can rightly claim a proprietary interest.

His petition asserts that for a quarter of a century, before the outbreak of the last war, he was a commercial fisherman at Los Angeles. Annually he applied for and received a commercial fishing license. When he returned in 1945 from his enforced evacuation from California, he attempted to resume his former occupation of commercial fishing on the high seas. To do this under the law of California he needed a license to use

and assist in using a boat and equipment for fishing and to land his catch in California. This had been true before his departure, but in his absence the law had been changed, and by its terms he was made ineligible to obtain a license because, being an alien of Japanese ancestry, he was not eligible to citizenship, and to all such ineligible licenses were denied.

The law did not tell him directly that he could not fish in the high seas. It did tell him, quite as affirmatively that he could not, within three miles of the California coast, use or assist in using a boat or any of the equipment necessary in fishing and that he could not land his catch in California. So he was cut off from his occupation.

The fact that the petitioner seeks to fish in the open ocean and is prevented from doing this is not a technical nor accidental fact peculiar to his situation. All the Japanese licensed commercial fishermen of California were for many years before the war Pacific Ocean fishermen and fished out of the four ports of Los Angeles, San Diego, Monterey and San Francisco.<sup>1</sup>

The effect of the legislation of 1943 and 1945—and, as we shall show below, its purpose—was to prevent them from earning their livelihood in this historic manner.

We stress this fact because it is important to understand that the petitioner and the other Japanese alien fishermen, like all California commercial fishermen, earned their living from a fishery only a portion of which—and the smaller portion of which—lies within

<sup>1</sup> Division of Fish and Game of California, Bureau of Commercial Fisheries, Fish Bulletin No. 49, The Commercial Fish Catch of California for the Year 1935, p. 144; Fish Bulletin No. 57 for the Years 1936-1939, Inclusive, p. 19; Fish Bulletin No. 58 for the Year 1940, p. 25; Fish Bulletin No. 59 for the Years 1941 and 1942, p. 24.

three miles of the shore. What Californians, with pardonable pride, refer to as "the California fisheries" extends over waters of multifarious jurisdiction. As the California Fish and Game Commission once put it (*Fish Bulletin No. 15, 1929, p. 9*):

"Although one fishery, it is arbitrarily cut into four parts by two imaginary lines drawn on the map. The boundary between the United States and Mexico when extended westward divides the area horizontally into northern and southern portions, while the three mile limit running vertically cuts a three-mile strip off the eastern edge of the fishing area. *The fishermen, the fish, and the ocean currents pay little attention to these lines, and the only excuse for drawing them is in such cases as involve the levying of duty or determining state and national jurisdiction.*" (Italics ours.)

Unfortunately, adequate statistics have never been collected as to the proportion of the catch attributable to each of these "imaginary" areas. A rough idea may be obtained, as to some of the more important and valuable species of fish, by leafing through California Fish and Game publications.

California Marine Fisheries officials noted that the range of the California tuna boats had by 1934 made "Costa Rica, Panama and the Galapagos Islands . . . the common fishing grounds" (*Fish Bulletin No. 44 for the Years 1930-1934, Inclusive, p. 41; Fish Bulletin No. 49 for the Year 1935, p. 26*), and publicly regretted war-time restrictions on operating tuna boats south of 10° N. latitude, a line which runs through San Jose, Costa Rica. *State of California, Department of Natural Resources, Thirty-seventh Biennial Report of the Division of Fish and Game for the Years 1940-1942, p. 49.* Conservation studies of the sardine and mackerel fisheries have involved the release of California-tagged fish



off the coasts of Mexico and Oregon, and cooperation with the fisheries departments of Canada, Washington, and Oregon, and with the United States Fish and Wildlife Service. *Id.*, at 48, 49; *Thirty-eighth Biennial Report for the years 1942-1944*, at 37, 38.

*Fish Bulletin No. 48, Fishing Locations for the California Sardine, 1928-1936*, pp. 9-11, reported that during the period covered 52 per cent of the sardine catch for the Monterey area occurred within three miles of shore, while 36 per cent of the San Pedro (Los Angeles) catch was attributable to coastal waters. For the San Francisco and San Diego areas "scanty data" was said to "suggest that the fishing for large sardines from these two ports is carried on at greater distances from shore." It was estimated that "off Orange and San Diego counties . . . only about 20 per cent of the catches for adult sardines are made within the three-mile limit."

These samplings from the Fish and Game Commission publications, sketchy though they be, indicate that a substantial, if not a major, portion of the California catch originates outside coastal waters.

We stress these facts pertaining to the "California" fishing grounds frequented by Japanese alien commercial fishermen because it enables this Court, in considering the facts of this case, and also the broader questions of the impact and purpose of the legislation in question, to lay to one side arguments and cases which have much occupied both the Supreme Court of California and counsel for the respondents in this case. These arguments and cases deal with the powers of the several states over fish and wild animals in which the state has a proprietary interest.

It is argued, and has been held, in some cases that, in legislating as a proprietor disposing of property which it holds in ownership for the benefit of the whole

people, the state may grant favors or impose disabilities which it could not do in legislating on matters as to which persons within its borders have legal rights protected by constitutional restraints.

The terms used are that persons within a state have no "right" to reduce to possession animals and fish which are the property of the state; that this is a "privilege" which the state may grant or refuse free from customary constitutional inhibitions. Happily the considerations which underlie these cases are not present here, and we need not be detained by words and concepts which, if not metaphysical, are at least confusing in considering the simpler issues presented here.

We assume that it will not be argued that the State of California has any proprietary right or ownership in fish in the high seas. Indeed, after the decision of this Court in *United States v. California*, 332 U. S. 19, no valid argument can be advanced that the State of California has ownership in any fish in coastal waters beyond the low water mark. But wholly apart from that case, it is plain that "the California fisheries" are ocean fisheries extending far beyond coastal waters, that many fishermen work entirely outside the territorial jurisdiction of the State, whatever claims are made for it, and that the habits of the fish and the nature of the ocean currents make the "boundary" of the three-mile limit no boundary at all. Under these circumstances, the conception that the State of California "owns" these fish is little short of absurd. This is not to say that California does not have a vital interest in and broad legislative authority over its own citizens and inhabitants—and perhaps others—who may fish in these waters (see *Skiriotes v. Florida*, 313 U. S. 69), or over those who may seek to land fish in its territory (see *Bayside Fish Co. v. Gentry*, 297 U. S. 422); but this authority does not spring from proprie-

tary interests. While the State may legislate, it must do so within limits of established constitutional restraints and in a manner not inconsistent with national action.

Indeed, the interest of the State in the fish in coastal waters of the high seas is well indicated, and in a manner significant to the issues of this case, in the Proclamation of the President of the United States of September 28, 1945. There, referring to the fisheries resources contiguous to the coasts of the United States, the President pointed out that "such fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource." 59 Stat. 885.

The petitioner asserts his right of access to these resources "as a source of livelihood," in the President's words.

The question presented here is not the limit to which the State may go in disposing of property which it owns, but whether the State has lawfully denied to the petitioner, because of his race and alienage, an ordinary, and his accustomed, means of earning a livelihood.

The trial court saw clearly that such was the issue presented. It said (R. 17-18):

"Under each and both, [i.e., Section 990 of the Fish and Game Code of California, as amended in 1943 and 1945] alien Japanese are denied a right to a license to catch fish on the high seas for profit, and to bring them to shore for the purpose of selling the same in a fresh state. As was stated in the Abe case, *supra*,<sup>1</sup> this discrimination constitutes an

<sup>1</sup>The court here refers to *Abe v. Fish and Game Commission*, 9 Cal. App. 2d 300; 49 P. 2d 608 (1935); petition for hearing denied by Supreme Court of California, November 25, 1935. This case also arose

unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, wherein and whereby a state is forbidden to deny to any person within its jurisdiction the equal protection of the laws. In respect to the right to fish upon the high seas for profit, and to bring the catch to the California shore for the purpose of selling the same in a fresh state, the alien Japanese, resident of California, though ineligible to citizenship in the United States, is entitled to the same equal protection of the laws that is accorded to all other persons engaged in the same business."

The trial court here, as did the District Court of Appeal in the case cited in the text, found the principles governing the decision squarely decided by this Court in the case of *Truax v. Raich*, 239 U. S. 33. We turn therefore to a consideration of that case.

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under section 990 of the Fish and Game Code, and also the plaintiff was the owner of a fishing boat, which for two years he had used in taking fish from ocean waters outside the State of California and beyond the jurisdiction thereof and in bringing the fish ashore within the State of California for the purpose of selling them in a fresh state. At the time the case arose, the statute did not contain the prohibition against the issuance of licenses to persons not eligible to citizenship, but did limit the issuance of licenses to persons who had continuously resided in the United States for a period of one year. The plaintiff's crew had not resided in the United States for that period and he was denied a license. The District Court of Appeal held the provision unconstitutional, as not a reasonable ground of classification and in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.



THE STATUTE WHICH DENIED PETITIONER THE RIGHT  
TO EARN HIS LIVING BY COMMERCIAL FISHING  
SOLELY BECAUSE OF HIS ALIENAGE DENIED HIM  
THE EQUAL PROTECTION OF THE LAWS GUARANTEED  
BY THE FOURTEENTH AMENDMENT

We have pointed out that the petitioner here seeks to fish on the high seas and not in any area where the State of California can properly claim a proprietary interest in the fishery resources, in order to point out the irrelevance of much of the argument which has taken place in this case. But this is not the fundamental and decisive fact here. The fundamental fact is that an inhabitant of California has been denied the right to earn his living in a common and proper occupation solely because he is an alien, and, even more, because he is an alien of a particular race.

Petitioner is and was a fisherman by trade. He applied for a *commercial* fishing license. He was not a sportsman seeking pleasure in the pastime of hunting or fishing, whose interest in this pursuit might not rise to the dignity of a right secured by the Constitution of the United States. But his interest in earning his living gives rise to a right; and, in dealing with that right, the State of California must give petitioner, as a person within its jurisdiction, the equal protection of the laws, or, as this Court said, putting it in another way, "the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S. 356, 369. It cannot discriminate against him because he is an alien; still less can it discriminate against him because he is an alien of Japanese ancestry. To all persons within its borders, citizens and aliens alike, the protection of their right to earn a living in a common and proper calling must be equal.

This statement, and the principles which underlie it, have nowhere been more fully and forcefully stated than by this Court in *Truax v. Raich*, 239 U. S. 33, 39, 41-42; 43:

"The question then is whether the act assailed [a state statute requiring employers to employ a certain percentage of citizens in proportion to aliens] is repugnant to the Fourteenth Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria [an alien], has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in *any State in the Union*. (See *Gegiw v. Uhl Commissioner*, decided October 25, 1915, *ante* p. 3.) *Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws.* The description—'any person within its jurisdiction'—as it has frequently been held, includes aliens. 'These provisions,' said the Court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment), 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' See also *Wong Wing v. United States*, 163 U. S. 228, 242; *United States v. Wong Kim Ark*, 169 U. S. 649, 695....

"It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, *does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or*

nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; *Barbier v. Connolly*, 113 U. S. 27, 31; *Yick Wo v. Hopkins*, *supra*; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590; *Coppage v. Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substan-

tial sense and in their full scope the privileges conferred by the admission would be segregated in such of the States as chose to offer hospitality. . . .

"The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law." (Italics ours.)

Such are the principles which are applicable here.

We submit that they would be equally applicable if the petitioner sought, as he does not in this case, to earn his livelihood through labor in a commercial fishery wholly within the territory or jurisdiction of California and was denied the right to do so solely because he was an alien of Japanese ancestry.

Whatever right the state may have to reserve for its own citizens the taking and exclusive enjoyment of fish or animals in which it has a proprietary interest, once it determines not to do that but to throw open to all—citizens, non-residents, aliens resident and non-resident, alike—the right to earn a livelihood by commercial fishing, disposing of the fish where they choose, it cannot lawfully discriminate against one small group of aliens because of their race. Furthermore, as we show below, it is a discrimination bearing no relation to any object of conservation and not put forward for that purpose. It is a discrimination solely against Japanese, as such, and designed to prevent them from earning a living from the sea, just as other laws of the same State were designed to prevent them from earning a living from the soil. See concurring opinions of Mr. Justice Black and Mr. Justice Murphy, *Oyama v. California*, October Term, 1947, No. 44, decided Jan. 19, 1948, 68 S. Ct. 269, at 276, 277. The end objective was that



they should leave the State. *Estate of Yano*, 188 Cal. 645, 658, 206 Pac. 995, 1001 (1922).

In quoting from the opinion in *Truax v. Raich*, *supra*, we omitted a portion—much relied on by counsel for respondents (Respondents' Brief in Opposition, p. 18)—Mr. Chief Justice Hughes said (pp. 39-40):

"The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. Thus in *McCready v. Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in *Patsone v. Pennsylvania*, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property. (*Hauenstein v. Lynham*, 100 U. S. 483; *Blythe v. Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise."

From this respondents reason that the principles of *Truax v. Raich* would not be applicable here if petitioner sought to take fish in which California had a proprietary interest. Nothing said by Chief Justice

Hughes, or in any of the decisions of this Court which he cited and those subsequent, warrants such a belief. Indeed, both *Truax v. Raich*, *supra*, and other decisions warrant the opposite conclusion."

The Chief Justice said, and cited *McCready v. Virginia*, 94 U. S. 391, as authority, that a state might reserve for its citizens, excluding non-residents and aliens, the use and enjoyment of the common property and resources of the state. But California does not seek to do this. It permits commercial fishing by anyone except Japanese. Nor does the State, as in *Geer v. Connecticut*, 161 U. S. 519, permit the taking of game and fish but prohibit their transportation out of the State. California is anxious and willing to have the products of its fisheries sent anywhere in the world. The Chief Justice, relying on *Patsone v. Pennsylvania*, 232 U. S. 138, referred to the power of a state to prohibit aliens as a class from killing game and possessing the arms suitable for this purpose where there was reasonable ground for supposing that this class constituted a particular conservation problem. But California does not seek to do this, and, as we shall point out below, the discrimination against one small class among aliens is not based or claimed to be based on any conservation purpose. It is sheer arbitrary discrimination, based on dislike and nothing more.

This Court in *Foster Packing Co. v. Haydel*, 278 U. S. 1, and *Johnson v. Haydel*, 278 U. S. 16, dealt with a not dissimilar situation. There the principle was announced that, while a state may, if it chooses, retain the products of its fisheries within its borders, it may not adopt the opposite course of permitting them to be sold in interstate commerce and yet attempt, by reliance on its proprietary interest, to place restrictions upon inter-

state commerce not ordinarily permitted under the Constitution.

In the *Foster Packing Co.* case, the State, while permitting the taking of shrimp in its waters and their sale abroad, attempted to prevent this sale unless the heads and tails were first removed. The parts had no value, the purpose and effect of the provision being solely to require the canning of the shrimp in Louisiana instead of in Mississippi. The Court declared the restriction invalid.

"As the representative of its people, the State might have retained the shrimp for consumption and use therein. But, in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw and unshelled shrimp from the Biloxi plants." 278 U. S. at 13.

When the State "relaxed its hold," by permitting the taking and exportation of the shrimp, the Constitutional limitations applied, and the State could not rely upon claim of ownership to achieve purposes which that concept was not created to permit, and which were forbidden by the Constitution.

The same principle has been applied in cases arising under the equal protection provision of the Fourteenth Amendment. In *Pavel v. Pattison*, 24 F. Supp. 915 (W. D. La. 1938), Louisiana, while permitting the taking of fur-bearing animals and alligators and the shipment of their skins abroad, attempted to prevent a non-resident owner of marshland, useful for no other purpose than trapping, and his non-resident lessee from

trapping on the land. A three-judge court found that the principle of *Foster Packing Co. v. Haydel, supra*, was applicable and enjoined the interference, as a denial of the equal protection of the laws. When the State attempted the same result by increasing the license fee for non-residents to such an amount as would make trapping unprofitable, the same court for the same reason declared the act unconstitutional. *Pavel v. Richard*, 28 F. Supp. 992 (W. D. La. 1938).

The doctrine of these cases is plainly sound and finds many analogies in constitutional law, where concepts may not be pressed to "a drily logical extreme," thereby defeating fundamental objectives of the law. Mr. Justice Holmes for the Court in *Noble State Bank v. Haskell*, 219 U. S. 104 at 110. The doctrine of property held in common ownership for the people of a state is the legal justification and explanation of the power of the states to protect and conserve their resources of fish and game and, if desired, to reserve them for their own citizens. It is not a doctrine which, when neither of these ends is sought, can be used to set aside constitutional limitations imposed upon the states for the equal protection of all persons within their jurisdiction.

### III

#### THE AMENDMENTS OF 1943 AND 1945 TO SECTION 990 OF THE FISH AND GAME CODE ARE NOT SUPPORTABLE AS CONSERVATION MEASURES

From the time of its enactment in 1909 until 1933 the law of California regulating commercial fishing and requiring licenses did not contain any qualification upon those who might apply for and receive such licenses. See Stats. 1909, p. 302; Stats. 1917, p. 686. In 1933



the Legislature imposed a qualification requiring residence within the United States continuously for one year prior to the application. Stats. 1933 chs. 73, 969. This qualification as noted above (p. 15, footnote), was declared unconstitutional by the courts of California.

In 1942 persons of Japanese ancestry were evacuated by military order from California. Included in this exodus were all the alien Japanese fishermen. These consisted of 699 persons who, as noted above, fished out of the four ports of San Francisco, Monterey, Los Angeles, and San Diego. In 1943 the statute was amended to read (Stats. 1943, ch. 1100):

"A commercial fishing license may be issued to any person other than an alien Japanese."

This 1943 amendment was a fresh expression of the anti-Japanese hysteria that has erupted periodically in California since the turn of the century. The same session of the California Legislature approved measures to re-invigorate the State's notorious Alien Land Law, which had been but lackadaisically enforced during the less prejudiced thirties; further enactments in this legislative pogrom against Japanese landowners were adopted by the 1945 California Legislature. Stats. 1943, chs. 1003, 1059; Stats. 1945, chs. 1129, 1136; see Comment, 56 *Yale L. J.* 1017, 1018, 1024-25 (1947). The history of the California anti-Japanese movement, its aims, and its method of operation as a protection of the public welfare, has been too recently before this Court to require extended comment here. See the concurring opinions of Mr. Justice Black and Mr. Justice Murphy, *Oyama v. California*, October Term, 1947, decided Jan. 19, 1948, No. 44, 68 S. Ct. 269 at 276, 277.

In 1945 further consideration was given to Section 990 of the Fish and Game Code, as amended in 1943, by

a California Senate Committee studying various anti-Japanese measures. *Report of the Senate Fact-Finding Committee on Japanese Resettlement, May 1, 1945.*<sup>1</sup> That Committee reported as follows on the subject of "Japanese Fishing Boats" (pp. 5-6):

"The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute."<sup>2</sup>

A few months later, Section 990 was revised to read as it reads today, with the phrase "any person other than a person ineligible to citizenship" substituted for the phrase "any person other than an alien Japanese," as recommended by the Senate Committee. Stats. 1945, ch. 181.

<sup>1</sup> A copy of this Report has been lodged with the Clerk in connection with *Oyama v. California*, October Term 1947, No. 44, decided Jan. 19, 1948.

<sup>2</sup> Respondents' Brief in Opposition, p. 33, sought to diminish the importance of this passage because, *inter alia*, "the report . . . dealt primarily with the alien land laws and the Tule Lake riot." To petitioner, this is one of the most damning facts about the whole matter—that amendment to exclude persons "ineligible to citizenship" was proposed, not by a committee concerned with conservation of fish, but by one interested in the Japanese as a group.

The trial court, after setting out these facts, concluded (R. 17):

"As it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California, and as the Court must take judicial notice of the same fact, it becomes manifest that in enacting the present version of Section 990, the Legislature intended thereby to eliminate alien Japanese from those entitled to a commercial fishing license by means of description rather than by name. To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent."

The dissenting justices in the Supreme Court found the arguments leading to this conclusion "highly persuasive," (R. 53) but the majority asked: "Can it be said with certainty that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California?" They found certainty lacking, since the "Fish Bulletins" compiled by the State, while stating the nativity of practically all the licensees, grouped some scattered few under "all others," and the official statistician stated that she did not know, without examining the individual applications, whether licenses had been granted to persons ineligible to citizenship other than Japanese (R. 40, 27). However, the writer of a recent article has checked the records and found that in the fifteen years from 1930 through 1944 at one time or another only three fishermen ineligible to citizenship—as the federal law stood in 1945—other than Japanese were licensed—two Koreans and a Guamese. In 1944, prior to the

amendment of 1945, there were none but Japanese. Howard Goldstein in a "Survey" of "California's Anti-Alien Fishing Law," *Pacific Citizen*, Vol. 26, No. 3, Jan. 17, 1948, p. 2. It thus appears that what was common knowledge in California was, indeed, knowledge.

So the majority of the Supreme Court of California concluded that the amendment which changed the proscription against Japanese—after a report which expressed fear that this might be declared unconstitutional—to one against persons ineligible to citizenship was not aimed against the Japanese but was a conservation measure. They said (R. 40):

"By the amendment, it may be inferred, the legislature desired to extend conservation measures and did not rewrite the statute for the purpose of discriminating against alien Japanese."

It found the method chosen admirably suited to the purpose (R. 38):

"Obviously, if the legislature determines that some reduction in the number of persons eligible to hunt and fish is desirable, it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so."

Of course, the case before the court did not have to do with hunting and fishing, governed by other provisions of the statute, but with commercial fishing. Is it obvious that the Legislature wished to reduce the number of persons engaged in this occupation? Is there any evidence that the Legislature or the executive departments ever sought or desired to promote any conservation measure in the commercial fisheries by reducing the number of persons engaged in it? Would it be logical and fair, if this were desired, to single out this



particular group, or indeed any group defined with total irrelevance to the conservation problem involved? Last of all, would it be within the legislative power of the State to do so?

In the years preceding the evacuation of Japanese from California in 1942, while the number of commercial fishermen had been increasing, the number of alien Japanese in this occupation had been decreasing. The figures are:<sup>1</sup>

License Year	Total Commercial Fishermen	Alien Japanese	Other Aliens
1935-36	6007	860	not available
1939-40	8724	807	1580
1940-41	9047	759	1496
1941-42	9344	699	1577

In 1942 approximately a thousand fishermen were eliminated by evacuation or the refusal of licenses to certain alien enemies, and others joined the armed services. Yet the total reduction was small and temporary. The effect of the elimination of the Japanese upon the numbers fishing out of the four ports from which all Japanese fished was negligible. The figures are:<sup>2</sup>

License Year	Total Fishermen	Number in Four Ports	Increase or Decrease from 1941 in Four Ports
1941-42	9344	7757	
1942-43	9043	7691	—66
1943-44	11803	10403	+2646
1944-45	10871	9102	+1345
1945-46	11747	9444	+1687

<sup>1</sup> Fish Bulletin No. 49, *supra*, p. 143; Fish Bulletin No. 57, p. 18; Fish Bulletin No. 58, p. 25; Fish Bulletin No. 59, p. 23.

<sup>2</sup> Fish Bulletin No. 59, *supra*, pp. 24-25; Thirty-Eighth Biennial Report, *supra*, p. 35; Thirty-Ninth Biennial Report, p. 103.

Commenting on the operations of these years the Bureau of Marine Fisheries of California said:

"In the following license year, 1942-1943, many new men entered our fisheries to partially offset the number of fishermen who joined the armed services and the aliens who were not permitted to continue fishing. Approximately 700 Japanese and 300 Italians were denied fishing privileges but the total number of fishermen decreased only 300. There was an increase of more than 800 in the total native born fishermen during this second license period." *Fish Bulletin No. 59, supra*, p. 21.

"The total landings in these two years [1942 and 1943] were 416,172,000 pounds behind the landings in the previous biennium, but the total value of the fishery products produced was the highest ever recorded for this State. Shortage of labor resulted in a decrease of 29 per cent in the production of canned fish....

"It is of interest to note that while the number of fishermen dropped in the 1942-43 season, from the previous season, the number of commercial fishing licenses sold in the 1943-44 season was the largest ever recorded for this State. The decrease in 1942-43 was due in part to the loss of the Japanese fishermen who were barred from operations off the coast. These were only partially replaced by the other nationalities.

"Interest in the lucrative albacore and soupfin shark fisheries, which were successful in 1943, as well as high prices of all fish, encouraged large numbers of people to enter the industry. However, commercial licenses were also bought by some solely to qualify for the Coast Guard passes required for movement of boats in ocean waters. An unknown number of licenses must be classified as temporary, and do not represent a permanent increase in the number of commercial fishermen in the State." *Thirty-Eighth Biennial Report, supra*, pp. 33, 34-35.

It is plain from these reports that the State authorities had no interest in reducing, or desire to reduce, the number of commercial fishermen; and that they did not reduce the number of fishermen. It is plain also that the elimination of the 700 Japanese alien fishermen did not have, and could not have, any conceivable relation to any conservation problem. One may read the reports from one end to the other without finding a word associating these two ideas.

Indeed, the worries of the California fish authorities at the time of the enactment of these provisions excluding Japanese fishermen were of quite a different nature. The Bureau of Marine Fisheries discusses these in its Report dated July 1, 1944. *Thirty-Eighth Biennial Report, supra*, pp. 35-36.

The landings of sardines in California had accounted for nearly five-sixths of all fish landings in California by weight and for nearly half by value. Following the outbreak of the war, the sardine fishing fleet had been reduced by the loss of numbers of the boats to the Army and Navy. Those owning the remaining boats wished to ensure their own catch of fish and consequently both prevented the sale of fish to other purchasers and limited the catch per boat so that they should not exceed the capacity of their own plants. This led to prompt intervention of the California authorities. They forbade limitation of catch per boat and they undertook to set up a system of allocation. When this action was attacked in the courts, first the War Production Board and then a Coordinator of Fisheries established in the Department of the Interior of the United States took over authority. Imposition of limitation on boat catches was prohibited and other steps were taken "to obtain the greatest possible production" *Id.*, p. 36.

Turning to the condition of the fisheries, the Report continues:

"Analyses have been continued of the fisherman's catch per unit of effort expended. These studies, together with the age readings and length measurements, indicate that at present the sardine population is in a comparatively healthy condition due to good spawning survival in 1937 and 1939. These two year-classes have been the main support of the fishery for the past three or four seasons. *Thirty-Eighth Biennial Report, supra, p. 37.*

We submit, therefore, that the amendments of 1943 and 1945 were not, and were not intended to be, conservation measures. At the time they were proposed and adopted both the state and federal authorities were seeking, not to reduce, but to increase the production from these marine fisheries. Not only was no attempt made to reduce the number of ocean fishermen, but the authorities looked with favor upon their increase. The amendments were adopted solely and patently to exclude Japanese alien fishermen as such. This action was a denial of the equal protection of the laws, forbidden by the Fourteenth Amendment.

#### IV

~~THE AMENDMENT OF 1945 TO SECTION 990 OF THE FISH AND GAME CODE IS VOID BECAUSE CONTRARY TO STANDARDS WHICH THE NATION HAS ESTABLISHED IN A FIELD WHERE ITS AUTHORITY IS SUPREME~~

It is beyond question that the Federal Government has full and supreme authority over the conduct of affairs with foreign nations and that its enactments by treaty or law aimed at preventing injurious discriminations against aliens exclude inconsistent state



laws. *Hines v. Davidowitz*, 312 U. S. 52; see also concurring opinions of Mr. Justice Black and Mr. Justice Murphy in *Ogama v. California*, October Term, 1947, No. 44, decided Jan. 19, 1948.

Federal occupation of the field begins with the constitutional guarantees of freedom to pursue any legitimate occupation without government discrimination because of race or color. It continues with the provisions of the Civil Rights Act of 1866, the portion of which relevant here is contained in Section 41 of Title 8, U. S. C.:

"All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

This statute was one of the grounds relied on by the Federal Circuit Court in California for declaring unconstitutional a statute forbidding any corporation to employ any Chinese or Mongolian, the court pointing out that the right to follow a lawful calling was property—and, indeed, in many cases the only property—of the persons against whom this discrimination was directed. *In re Parrott*, 1 Fed. 481, 508 *et seq.* (C. C. Cal. 1880).

More recently the Federal Government has taken further action in this field. By Articles 55 and 56 of the United Nations Charter, this Government has pledged itself to take joint and separate action in cooperation with the Organization to achieve (59 Stat. 1035, 1045-46):

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

By action of the General Assembly of the United Nations, the United Nations Commission on Human Rights was established under the Economic and Social Council and directed to prepare an international bill of human rights. The General Assembly is to take action upon this bill of rights at its meeting in September, 1948. On November 30, 1947, the United States representative, Mrs. Franklin D. Roosevelt, by direction of her Government put forward the United States proposal in the form of a declaration of human rights.<sup>1</sup> Articles 9 and 10 of that draft are as follows:

#### "ARTICLE 9

"Everyone has the right to a decent living; to work and advance his well-being; to health, education and social security. There shall be equal opportunity for all to participate in the economic and cultural life of the community.

#### "ARTICLE 10

"Everyone, everywhere in the world, is entitled to the human rights and fundamental freedoms set forth in this Declaration without distinction as to race, sex, language, or religion. The full exercise of these rights requires recognition of the rights of others and protection by law of the freedom, general welfare and security of all." *Department of*

<sup>1</sup> For a summary of the organization and activities of the Human Rights Commission, see Mrs. Franklin D. Roosevelt's article, "The Promise of Human Rights," *Foreign Affairs*, Vol. 26, No. 3, April, 1948, p. 470.

*State Bulletin*, Vol. XVII, No. 440, Dec. 7, 1947, pp. 1075-6.

At its second session in Geneva in December, 1947, the United Nations Commission on Human Rights approved Draft Articles for an International Declaration on Human Rights and an International Convention on Human Rights. *Economic and Social Council Official Records, Third Year, Sixth Session, Supp. No. 1, Report of the Commission on Human Rights, United Nations Document E/600*, Dec. 17, 1947. Article 23 of the draft declaration provides (p. 17): .

"1. Every one has the right to work.

"2. The State has a duty to take such measures as may be within its power to ensure that all persons ordinarily resident in its territory have an opportunity for useful work. . ."

Article 20 of the draft convention provides as follows (p. 28):

"Every person shall be entitled to the rights and freedoms set forth in this Covenant, without distinction as to race (which includes colour), sex, language, religion, political or other opinion, property status, or national or social origin. Every person, regardless of office or status, shall be entitled to equal protection under the law against any arbitrary discrimination or against any incitement to such discrimination in violation of this Covenant."

At the same time that the Federal Government is joining with other nations in this endeavor through the United Nations, it is taking similar action in cooperation with the Republics of the Western Hemisphere.

**Resolution 41 of the Inter-American Conference on Problems of War and Peace held at Mexico City, February 21-March 8, 1945, provided:**

**"Whereas World peace cannot be consolidated until men are able to exercise their basic rights without distinction as to race or religion, the Inter-American Conference on Problems of War and Peace resolves:**

**"1. To reaffirm the principle, recognized by all the American States, of equality of rights and opportunities for all men, regardless of race or religion.**

**"2. To recommend that the Governments of the American Republics, without jeopardizing freedom of expression, either oral or written, make every effort to prevent in their respective countries all acts which may provoke discrimination among individuals because of race or religion." *Report of the Delegation of the U. S. A. to the Inter-American Conference on Problems of War and Peace, Mexico City, February 21-March 8, 1945, at p. 109.***

**Resolution 40 of the Mexico City Conference directed the Inter-American Juridical Committee to prepare a draft declaration of the international rights and duties of man for consideration by the Ninth International Conference of American States. This is the Conference to be held at Bogotá beginning March 30, 1948. In accordance with that resolution such a draft declaration has been prepared. The articles of that draft, so far as they are relevant here, are as follows:**

#### **"ARTICLE XIV**

#### **"RIGHT TO WORK**

**"Every person has the right to work as a means of supporting himself and of contributing to the support of his family.**



"This right includes the right to choose freely a vocation, in so far as the opportunities of work available make this possible, as well as the right to transfer from one employment to another and to move from one place of employment to another. . . .

### "ARTICLE XVIII

#### "RIGHT TO EQUALITY BEFORE THE LAW

"All persons shall be equal before the law. There shall be no privileged classes of any kind whatsoever.

"It is the duty of the state to respect the rights of all persons subject to its jurisdiction, affording them equal protection in the enjoyment of their rights, substantive and procedural alike.

"The restrictions imposed upon fundamental rights must be such only as are required by the maintenance of public order; and they must be general in character and applicable to all persons within the same class." *Project of Declaration of the International Rights and Duties of Man*, Formulated by the Inter-American Juridical Committee for Consideration by the Ninth International Conference of American States, Pan American Union, CB-7-E, Washington, 1948, pp. 8, 10.

The consideration of this declaration is on the Agenda of the Ninth International Conference of American States. *Ninth International Conference of American States, Bogotá, Colombia, March 30, 1948, Program and Regulations*, Pan American Union, CB-1-E, Washington, 1948, p. 6.

Thus it will be seen that the Federal Government has legislated domestically, and, in the international field, has twice agreed with other nations to eliminate within its borders the very discrimination on account of race which the amendment of 1945 to the California Fish

and Game Code, if valid, would perpetuate. This amendment must, therefore, fall in the face of this national action.

**CONCLUSION**

Wherefore, the decision below should be reversed.

Respectfully submitted,

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March 31, 1948.



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**In the Supreme Court**

**OF THE  
United States**

**OCTOBER TERM, 1947**

**No. 533**

**TORAO TAKAHASHI,**

*Petitioner,*

**FISH AND GAME COMMISSION, LEE F.  
PAYNE, as Chairman thereof, W. B.  
WILLIAMS, HARVEY E. HASTAIN, and  
WILLIAM SILVA, as members thereof,  
*Respondents:***

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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**In the Supreme Court**  
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**OCTOBER TERM, 1947**

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**No. 533**

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**TORAO TAKAHASHI,**

*Petitioner,*

**vs.**

**FISH AND GAME COMMISSION, LEE F.  
PAYNE, as Chairman thereof, W. B.  
WILLIAMS, HARVEY E. HASTAIN, and  
WILLIAM SILVA, as members thereof,**  
*Respondents.*

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

---

The State of California presents herewith its brief in opposition to the petition of Torao Takahashi for writ of certiorari to the Supreme Court of the State of California, which petition seeks to review the judgment and decision reported in 30 Advance California Reports, 723, 185 Pac. (2d) 805.



### STATEMENT OF THE CASE.

This case involves primarily the constitutionality of that portion of section 990 of the Fish and Game Code of California which precludes *all* persons ineligible to citizenship of the United States from obtaining commercial fishing licenses. The petitioner, Torao Takahashi, filed a petition in the Superior Court of the State of California for a writ of mandate to compel the Fish and Game Commission of this State and its members to issue such a license to him. (R. 1-2.) Certain parts of the petition were struck on motion (R. 5-6) but that action of the trial Court is not material to the discussion here. In substance the petition alleges that Mr. Takahashi was born in Japan; that he has been refused a commercial fishing license "solely because of his Japanese ancestry and solely because of the provisions of Section 990 of the Fish and Game Code" (R. 2), and that the section is unconstitutional on its face "because enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race," (R. 2.)

By their answer, the Fish and Game Commission and the Commissioners deny they refused to issue a commercial fishing license to Mr. Takahashi solely because of his Japanese ancestry. (R. 3.) They allege on information and belief that Mr. Takahashi is ineligible to citizenship of the United States and consequently they are not authorized by statute to issue a license to him. (R. 3.) They deny that section 990 is unconstitutional because, as Mr. Takahashi has

alleged, it is "enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race." (R. 3-4.) Respondents further deny that the code section does not afford due process and equal protection of the law. (R. 3-4.)

When the matter came on for hearing in the trial Court Mr. Takahashi reached the conclusion, apparently, that his fishing activities since 1915 had been confined solely to the high seas. For he voluntarily amended his petition by changing the nature of his occupation to that of "commercial fishing on the high seas". (R. 6.) At the same time he amended the prayer of his petition by asking for a commercial fishing license "to engage in commercial fishing on the high seas". (R. 6.)

The proceeding was heard by the trial Court on the petition, as thus amended, and on the answer. No evidence was offered or received and Mr. Takahashi did not countervail the answer by proof, either in direct denial or by way of avoidance.

In rendering its original judgment the trial Court found that Mr. Takahashi is ineligible to citizenship, but nonetheless is qualified to have issued to him a commercial fishing license under said section 990 "authorizing him to bring ashore in California, for the purpose of selling in a fresh state, his catches of fish from the waters of the high seas beyond the State's territorial jurisdiction". (R. 7.) On this finding it was adjudged that a writ of mandate issue compelling

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the Commission to issue a commercial fishing license as thus specified. (R. 7.)

The Commission appealed on July 2, 1946. (R. 8.) The transcript was filed in the reviewing Court on July 22, 1946. Seven days later the trial Court, on the ex parte application of Mr. Takahashi, made and entered an *amended judgment* commanding the Commission to issue to him a commercial fishing license. (R. 21.) Under the terms of the *amended judgment* the license is not qualified as to place of use as was done in the original judgment. Hence the license, if issued pursuant to the amended judgment, would permit Mr. Takahashi to fish commercially in *territorial waters of California* as well as on the high seas.

#### HISTORY OF THE LEGISLATION.

Section 990 of the Fish and Game Code presently reads as follows:

"Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state, shall procure a commercial fishing license.

6 A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license may be

issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship."

This code section was last amended in 1945. (Stats. 1945, ch. 181, sec. 3.) It should be noted that chapter 181 not only dealt with section 990 of the Fish and Game Code but with sections 427 (hunting licenses) and 428 (sport fishing or angling licenses) as well. The chapter amended each one of these sections, pursuant to which aliens ineligible to citizenship are

<sup>1</sup>Sections 1 and 2 of chapter 181 amended sections 427 and 428 of the Fish and Game Code to read as follows:

**427 Class A:**

"A hunting license, granting the privilege to take game birds and mammals, shall be issued:

(a) To any citizen of the United States, over the age of 18 years, who is a resident of this State, upon the payment of two dollars (\$2).

(b) To any citizen of the United States, under the age of 18 years, who is a resident of this State, upon the payment of one dollar (\$1).

(c) To any citizen of the United States, not a resident of this State, upon the payment of ten dollars (\$10).

(d) To any person, not a citizen of the United States, who shall have declared his intention to become such citizen according to the law made and provided for such purposes, who is a resident of this State, upon the payment of ten dollars (\$10). After such applicant has declared his intention to become a citizen he must complete his naturalization at the earliest period allowed by law. Such applicant shall make and subscribe an oath that he has not claimed his citizenship in a foreign country as a basis for avoiding service in the armed forces of the United States, and the person issuing such license is hereby empowered to administer such oath.

(e) To any person, not a citizen of the United States, upon the payment of twenty-five dollars (\$25), except as provided in subdivision (d) of this class; provided, however, that no



denied the privilege of obtaining hunting, sport fishing and commercial fishing licenses.

These three sections of the Fish and Game Code were next last amended in 1943 (Stats. 1943, ch. 1100) when "alien Japanese" were singled out by name as the only persons not qualified for a license to hunt, or fish for profit or pleasure.

Prior to the 1943 amendment all aliens were qualified for such licenses. The hunting license section (427) classified persons under and over the age of 18 years, citizen residents of this State, nonresident citizens, declarant aliens and those who have not declared their intention of becoming citizens. This same classification exists today except that ineligible aliens are denied hunting privileges altogether. Section 428, relating to sport fishing licenses, also classified persons as to age, citizenship and residence in this State.

Section 990 was first enacted in 1933 (Stats. 1933, ch. 73) when the fish and game laws were codified. At the same session of the Legislature, the section was

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such license shall be issued to a person ineligible to citizenship."

**428 Class B:**

"A sporting fishing license, granting the privilege to take fish for purposes other than profit shall be issued:

(a) To any citizen of the United States, over the age of 18 years, who is a resident of this State, upon the payment of two dollars (\$2).

(b) To any citizen of the United States, over the age of 18 years, not a resident of this State, upon the payment of three dollars (\$3).

(c) To any person, not a citizen of the United States, and over the age of 18 years, upon the payment of five dollars (\$5); provided, however, that no such license shall be issued to a person ineligible to citizenship."

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amended (ch. 969) and contained a restriction against persons who had not lived in the United States for one year. Since 1933 section 990 has not been affected by legislation until the amendment in 1943.

### QUESTIONS PRESENTED.

1. On the present state of the record, can the petitioner be afforded any relief?
2. Has a state the power to preclude *all* aliens ineligible to citizenship of the United States from hunting or fishing for profit or pleasure?
3. Irrespective of their nationality or race, does section 990 of the Fish and Game Code of California deny ineligible aliens equal protection and due process of law in violation of the Fourteenth Amendment of the Federal Constitution?

### ARGUMENT.

#### I.

#### ON THE PRESENT STATE OF THE RECORD THE PETITIONER CANNOT BE AFFORDED RELIEF.

Mr. Takahashi comes to this Court with a record which shows that he cannot be afforded relief. The Supreme Court of California properly decided the constitutional questions in accordance with established authorities. But it was unnecessary to do so. The amended judgment is void *ab initio* and the original judgment cannot be satisfied because the

Commission is not empowered to issue licenses to engage in commercial fishing exclusively on the high seas.

The memorandum opinion of the trial Court conceded that a classification of aliens into two groups, namely, those eligible and those ineligible to citizenship of the United States, is proper and within constitutional limits in so far as *fishing in territorial waters is concerned*. It holds, however, that the classification is improper as to "fish caught upon the high seas and outside the territorial jurisdiction of the state." (R. 15-16.) In keeping with its opinion the Commission was ordered to issue to Mr. Takahashi a license permitting him to *engage in commercial fishing upon the high seas only*. It would be impossible for the Fish and Game Commission to comply with such a judgment (R. 7) because the statute does not empower it to issue commercial fishing licenses qualified as to place of use. The statute only permits the Commission to issue licenses to engage in commercial fishing without qualification as to place of use, that is, whether the fishing is done on the high seas, in coastal ocean waters or in inland waters of the State.

The Commission appealed from the original judgment and the appeal divested the trial Court of any further jurisdiction in the case (R. 33); *Linstead v. Superior Court*, 17 Cal. (2d) 9; *Kinard v. Jordan*, 175 Cal. 13.)

After the appeal had been perfected, Mr. Takahashi apparently realized that he had run into a *cul de sac* for he applied ex parte to the trial Court to

amend the original judgment. On his motion the judgment was amended and the Commission was directed to issue a commercial fishing license to him without qualification as to place of use. (R. 21.) However, at that time the trial Court had no jurisdiction of the case and hence its amended judgment is void. (R. 34.)

An appeal was taken from the amended judgment and the Supreme Court of California considered the appeal from the amended judgment on the basis of an order made subsequent to judgment. But that Court need not have done so. A void judgment cannot be vitalized by an affirmance on appeal (*Ball v. Tolman*, 135 Cal. 375; *Pioneer Land Co. v. Maddux*, 109 Cal. 633; *Sullivan v. Gage*, 145 Cal. 759.)

It thus appears that Mr. Takahashi cannot be afforded any relief under the void amended judgment. Moreover, he cannot be afforded relief under the original judgment even if the trial Court is affirmed and the Supreme Court of California is reversed because the Fish and Game Commission is not authorized by statute to issue a license in the form that the original judgment directs, namely, to permit Mr. Takahashi to engage in commercial fishing on the high seas only.

It thus appears that all questions as to the validity or constitutionality of the statute involved are purely hypothetical and abstract.



## II.

**SECTION 990 OF THE FISH AND GAME CODE OF CALIFORNIA DOES NOT DENY EQUAL PROTECTION OF LAWS TO ALIENS INELIGIBLE TO CITIZENSHIP NOR DOES IT DIVEST THEM OF PROPERTY WITHOUT DUE PROCESS OF LAW.**

(a) No property rights are involved in this case. Fishing for pleasure or profit is a privilege—not a right.

Perhaps the most startling thing about Mr. Takahashi's petition is the fact that not one case involving fish or game law is cited in support of his principal contention that section 990 violates the equal protection and due process clauses of the Federal Constitution. All of his cases are not germane and are distinguishable on the facts.

It has long been recognized not only in California but throughout the United States that free swimming fish, like game, are classed as animals *ferae naturae*. (*In re Parra*, 24 Cal. App. 339; *People v. Monterey Fish Products Company*, 195 Cal. 548; *Bayside Fish Flour Company v. Gentry*, 297 U. S. 422) and, until reduced to actual possession, are the property of the state in its sovereign capacity as trustee for all its people. (*Bayside Fish Flour Company v. Zellerbach*, 124 Cal. App. 564; *People v. Monterey Fish Products Company*, 195 Cal. 548; *Pacific Gas and Electric Company v. Moore*, 37 Cal. App. (2d) 91; *People v. Hovden Company*, 215 Cal. 54.) If fish are reduced to possession in violation of law, the possessor does not acquire title thereto. (*Suttori v. Peckham*, 48 Cal. App. 88; *People v. Monterey Fish Products Company*, 195 Cal. 548.)

It follows that an individual cannot obtain an absolute property right in fish or game except upon such conditions, restrictions and limitation as the State may impose. Because the State has power to alienate fish or game on such terms as it sees fit, whatever interests a person has attach only as a matter of privilege; not, as a matter of right. (*Geer v. Connecticut*, 161 U. S. 519; *Ex parte Maier*, 103 Cal. 476; *Kellogg v. King*, 114 Cal. 378; *People v. Truckee Lumber Company*, 116 Cal. 397; *Ex parte Kenneke*, 136 Cal. 527; *In re Phoedovius*, 177 Cal. 238; *Paladini v. Superior Court*, 178 Cal. 369; *State v. Monteleone*, 131 S. 291, 171 La. 437.) It has also been stated that, as no absolute property right is acquired in fish or game, any restrictions placed on the taking thereof deprive no person of a property right which is within the protection of the Constitution. (*Shouse v. Moore*, 11 F. Supp. 784; *People v. Clair*, 116 N. E. 868, 221 N. Y. 108; see also *In re Phoedovius*, 177 Cal. 238.) Hence when applied to the regulation of fish and game, due process and equal protection of laws depend on the same principles. (*Shouse v. Moore*, 11 F. Supp. 784; *Thomason v. Dana*, 52 Fed. (2d) 759; aff. 285 U. S. 529.)

(b) Equal protection of laws is not denied where the State confers exclusive privileges of hunting and fishing.

Since fish are owned by the State and may become the subject of private ownership only in a qualified way, the legislature may adopt such laws for the protection of fish as it deems proper, subject to constitutional provisions against discrimination. (*Bayside*

*Fish Flour Co. v. Gentry*, 297 U. S. 422; *Skiriotes v. Florida*, 313 U. S. 69; *In re Phoedovius*, 177 Cal. 238; *Ex parte Makings*, 200 Cal. 474; *In re Florence*, 100 Cal. App. 607; *Svenson v. Engelke*, 211 Cal. 500; *Ex parte Vitalie*, 117 Cal. App. 553; *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. (2d) 56; see also Sec. 25½, Art. IV, Constitution of California.) This has also been held to be a valid exercise of the police power (*Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422; *Lawton v. Steele*, 152 U. S. 133; *Manchester v. Massachusetts*, 139 U. S. 240; *Paladini v. Superior Court*, 178 Cal. 369; *Geer v. Connecticut*, 161 U. S. 519; *People v. Stafford Packing Co.*, 139 Cal. 719.)

The power to regulate fish and game includes the power to require fishermen to obtain licenses and to pay fees therefor. (*In re Parra*, 24 Cal. App. 339; 22 Amer. Jur. 701, Sec. 46.) Licenses to take fish and game are a mere privilege. They are subject to all statutory requirements and may be taken away by the State in the exercise of its police power. (*Paladini v. Superior Court*, 178 Cal. 369; *State v. Bennett*, 288 S. W. (Mo.) 50.)

The State may confer exclusive rights of fishing and hunting on its own citizens and expressly exclude aliens and nonresident citizens without violating constitutional restraints. This rule is well established throughout the United States. (*State v. Gallop*, 126 N. C. 790, 35 S. E. 180; *In re Eberle*, 98 Fed. 295; *People v. Cummings*, 211 Ill. 392, 71 N. E. 1031; *McCready v. Virginia*, 94 U. S. 31; *Commonwealth v. Hilton*, 174 Mass. 29, 54 N. E. 362; *State v. Kofnes*,

33 R. I. 211, 80 Atl. 432; *People v. Setunsky*, 161 Mich. 624, 126 N. W. 844; *Haavik v. Alaska Packers Association*, 263 U. S. 510; *State v. Leavitt*, 105 Me. 76, 72 Atl. 875; *People v. Brennan*, 255 N. Y. S. 331; *Territory v. Takanabe*, 28 Haw. 43 (aliens); *State v. McCullagh*, 96 Kan. 786, 153 Pac. 557; *State v. Niles*, 78 Vt. 266, 62 Atl. 795; *Patson v. Pennsylvania*, 232 U. S. 138 (aliens); *LaCoste v. Department of Conservation*, 151 La. 909, 92 So. 381 (affirmed 263 U. S. 545); *State v. Catholic*, 75 Ore. 367, 147 Pac. 372; *Silver v. State*, 147 Ga. 162, 93 S. E. 145 (aliens); *Alsos v. Kendall*, 111 Ore. 359, 227 Pac. 286 (aliens); *State v. Maybury*, 136 Wash. 210, 239 Pac. 552 (aliens); 12 Corpus Jur. 119.)

The point is well covered in *Lubetich v. Pollack*, 6 Fed. (2d) 637. The question in that case was the validity of a Washington law which limited fishing privileges to citizens and *declarant aliens*. Please note that ineligible aliens were thus excluded. Certain residence requirements were also imposed. In sustaining the constitutionality of the statute the Court said (pages 638, et seq.):

"It cannot be doubted that the clause of the Fourteenth Amendment guaranteeing equal protection of the laws is of universal application to all persons within the territorial jurisdiction involved, and includes within its protection aliens, without regard to race, color, or nationality. The first question for decision, therefore, is: Does the statute under review amount to a denial of such equal protection? The whole question of the ownership of fish and game and the nature of the



title thereto is exhaustively considered by the Supreme Court in the case of *Geer v. Connecticut*, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793. In that case the Court had under consideration a statute of Connecticut which made it unlawful to kill any woodcock, ruffed grouse, or quail for the purpose of conveying the same beyond the limits of the state. Both the civil and common law authorities were elaborately reviewed, and in the course of the opinion Mr. Justice White declared that from the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the control of the law giving power; that the wild game within a state belongs to the people in their collective sovereign capacity; that it is not the subject of private ownership except in so far as the people may choose to make it so, and they may, if they see fit, absolutely prohibit the taking of it or the traffic or commerce in it.

\* \* \* \* \*

Obviously it is a denial of the equal protection of the laws when a lawmaking body, regulating, *not its own property, but private business*, undertakes to deny to aliens the right to engage in lawful trade or labor; but it is *difficult to comprehend how there can be any such violation when the government, in its capacity of owner and proprietor of property, refuses to allow an alien the right to share therein on equal terms with those for whom the property involved is held in sovereign trust*. In such circumstances aliens are denied participation in the property, for the simple reason that they do not own it, either in whole or in part, and in consequence have no right to share its enjoyment." (Italics added.)

In *People v. Magner*, 97 Ill. 320, at page 333 the Court said:

"The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify or restrict, as in the opinion of its members will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege, granted, either expressly or impliedly, by the sovereign authority—not a right inherent in each individual; and, consequently, nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence by implication it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state. But in any view, the question of individual enjoyment is one of public policy and not of private right."

*McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248, involved a statute of Virginia which prohibited persons who are citizens of that state from planting oysters or shellfish in certain tidewaters. It was held that the statute did not violate the Fourteenth Amendment of the Federal Constitution. This Court said (page 394):

"The principle has long been settled in this court that each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away \* \* \* In like manner, the states own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty \* \* \* The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state which has consequently the right, in its discretion, to appropriate its tidewaters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship \* \* \* And as all concede that a state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."

In *Patson v. Pennsylvania*, 232 U. S. 138, 34 S. Ct. 281, 58 L. Ed. 539, the Court had under consideration

a statute of Pennsylvania making it unlawful for an unnaturalized, foreign-born, resident to kill any wild bird or animal, except in defense of person or property and to that end made it unlawful for such a person to own or be possessed of a shotgun or rifle. The constitutionality of that statute was challenged as being violative of the Fourteenth Amendment. Citing *Geer v. Connecticut*, 161 U. S. 519 this Court said:

"It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for its own citizens if it pleases."  
(Page 145.)

It has also been held that statutes which impose a greater license fee to take fish or game on one group of persons than on others are not unconstitutional. (*People v. Cummings*, 211 Ill. 392, 71 N. E. 1031; *People v. Setunsky*, 161 Mich. 624, 126 N. W. 844; *LaCoste v. Department of Conservation*, 151 La. 990, 92 So. 381 (affirmed 263 U. S. 545); *Bondi v. McKay* (Vt.), 89 Atl. 228; *Allen v. Wyckoff* (N. J.), 2 Atl. 659; see also 61 A. L. R. 338, 112 A. L. R. 63.)

In other matters of public concern aliens have constitutionally been barred from participation. Thus it is no denial of equal protection or due process of law to preclude aliens from obtaining an "on sale distilled spirits license" (*Tokaji v. State Board of Equalization*, 20 Cal. App. (2d) 612); to prevent an alien from conducting a pool or billiard parlor (*Ohio v. Deckebach*, 274 U. S. 392); from engaging in the business of pharmacy (*Sashihara v. Board of Pharmacy*, 7 Cal. App. (2d) 563); from practicing law (*In re Yama-*



*shila*, 30 Wash. 234, 70 Pac. 482; *Large v. The State Bar*, 218 Cal. 334); from possessing concealed weapons (*People v. Cordero*, 50 Cal. App. 146), and from being licensed as an auctioneer (*Wright v. May*, 127 Minn. 150, 149 N. W. 9.) In each of these instances the right to carry on such businesses or do such things was accorded to the citizen. Many other examples might be cited but these few illustrate the general rule.

### III.

**COMMERCIAL FISHING IS AN OCCUPATION WHICH IS NOT OPEN TO AN ALIEN AGAINST THE LEGISLATIVE WILL OF THE STATE**

The petitioner and, indeed, the minority of the Supreme Court of California place great reliance upon *Truax v. Raich*, 239 U. S. 33. This case is quoted at length to support the contention that the right to work for a living in the common occupations of the community is open to all and may not be denied. However, to our minds, the minority opinion of the Supreme Court of California omits the most important part of *Truax v. Raich* from its lengthy quotation. (R. 46 fol. 98.) We supply the deficiency here by quoting the important part of *Truax v. Raich* which the minority opinion omits, viz:

"The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as

against both aliens and the citizens of other States. Thus in *McCready v. Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in *Patson v. Pennsylvania*, 232 U. S. 138, 145, 146 where the discrimination against aliens upheld by the Court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham*, 100 U. S. 483; *Blythe v. Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise." (*Italics added.*)

It requires no lengthy argument to show that the facts pertaining to Mr. Truax (a cook) are entirely different from those pertaining to Mr. Takahashi (a former commercial fisherman). The latter does not have the right to choose fishing as an occupation since the State may, if it desires, preclude fishing entirely. This is demonstrated by the case of *Alsos v. Kendall*, 111 Ore. 359, 227 Pac. 286. In that case the Court said (at page 290):

"The rights of the state in the fish and in the waters from which the fish are to be taken are

superior to plaintiff's right to choose fishing for salmon in those waters for an occupation. Such an occupation is not open to an alien against the legislative will of the state, since it involves the appropriation of property belonging to the state in its sovereign capacity. The state, in prohibiting aliens from engaging in the taking of salmon fish, is dealing with the common property of the people of the state; in prohibiting citizens of other states and unnaturalized foreign-born residents from fishing in the public waters of the state the state is, in fact, dealing with a property right of the state, and not with a mere privilege or immunity of a citizen of another state, nor does it amount to a denial to an alien within the state of the equal protection of its laws."

In the *Alsos* case the Court concluded that the Oregon statute which prohibited an alien from accepting employment from one lawfully engaged in fishing and thereby preventing him from earning a livelihood in that particular field did not render the statute unconstitutional. The reasoning of the Oregon Court was followed in *Lubetich v. Pollack*, 6 Fed. (2d) 237, in *Curry v. Moran*, 76 Fla. 373, 79 So. 637, and *Haavick v. Alaska Packers' Association*, 263 U. S. 510, 68 L. Ed. 414.

## IV.

**ELIGIBILITY TO CITIZENSHIP FURNISHES A REASONABLE BASIS FOR CLASSIFICATION.**

It has been shown that a State may make a valid classification between citizens and aliens with respect to the privilege of hunting or fishing for pleasure or profit. It has also been shown that a State may likewise classify citizens of the United States, that is, residents of the State and non-residents, with respect to the privilege of hunting or fishing for pleasure or profit. This brings us to the next question as to whether the State may classify aliens into two groups, viz: (1) those who are eligible to citizenship and (2) those who are not. That is all the legislature has done by the 1945 amendment, chapter 181 to sections 990, 427 and 428 of the Fish and Game Code. *Terrace v. Thompson*, 263 U. S. 197 seems to answer this question at page 220 where it said:

"The State (of Washington) properly may assume that the considerations upon which Congress made such classification (between eligible and ineligible aliens) are substantial and reasonable \* \* \* Two classes of aliens inevitably result from the naturalization laws, — those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act." (Parentheses supplied.)

The basis for classification between eligible and ineligible aliens seems to have greater force and logic



in its application to the case at bar than it did to the alien land law cases for these reasons:

1. *private* property rights of the individual are not involved here as they were in the alien land law cases;
2. *public* property rights are at issue here and were not involved in the other cases;
3. *individual privilege* alone is at issue here, the taking of fish being a privilege and not a right;
4. if a state may properly concern itself with the type of people who may possess its lands, it may also exercise similar concern as to those who take its property, namely, fish and game.

It is suggested by Mr. Takahashi that the reduction in the number of persons who may fish does not have a reasonable relation to the objects of conservation and hence such reduction in the number of persons is not within the police power of the State (petition, page 9). This is hardly correct. The language of chapter 181 (amending sections 990, 427 and 428 of the Fish and Game Code) is clear and unequivocal. By the amendment the number of persons eligible to hunt or fish for pleasure or profit was reduced. On its face this is a conservation measure because, by limiting the number of eligible persons to hunt or fish, more fish and game will be conserved.

Man is the greatest and most destructive of all fish and game predators. Therefore it is inescapable that when the State denies hunting and fishing privi-

leges to a particular group, such as ineligible aliens, fish and game are thus conserved. Obviously if some reduction in the number of persons eligible to hunt and fish is found necessary it is logical and fair that the first group to be denied the privilege should be the aliens ineligible to citizenship. They never can become a part of the State, and hence there is no reason why they should not be the first to be excluded from the enjoyment of the State's resources of wildlife. If a further reduction is necessary the next group to be denied the privilege would normally be eligible aliens, then nonresident citizens and finally, if full protection is needed, citizen residents of the State themselves.

It is evident that by the 1945 amendment the legislature took the greater step in the conservation of the State's resources than it did in 1943 because California is populated by more ineligible aliens than persons of Japanese ancestry. (Cf. Sixteenth Census of the United States.)

This reduction of the number of persons eligible to hunt and fish bears a reasonable relation to the object of conservation of fish and game and is within the purview of the State's police powers. Hence the 1945 amendment cannot be declared invalid because a court may regard it ineffectual, harsh or even as an aid to an objectionable policy (cf. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422).

The consequences of the fishing activities of one commercial fisherman alone are brought to light by reference to the complaint and supplemental com-

plaint in a case companion and incidental to Mr. Takahashi's. This case is entitled *Tsuchiyama v. Fish and Game Commission*<sup>2</sup>. From the pleading of the *Tsuchiyama* case it may be inferred that one commercial fisherman alone may expect to take in one season fish valued at \$10,000. This sum is the measure of the actual damages claimed by virtue of the fact that Mr. Tsuchiyama was not permitted to engage in fishing for one season. Assuming for illustration that one-half of this sum represents tuna and albacore (cf. R. 19) and the other one-half represents sardines, the sum is comparable to 34,000 pounds of tuna and albacore and 500,000 pounds of sardines at prices current as of the date when the suit was filed, namely, August 5, 1946. Consequently, a large number of fish are conserved by the elimination of just one commercial fisherman. Multiply that amount by the 200 fishermen in whose behalf Mr. Tsuchiyama sued, or by the total number of ineligible aliens throughout California, and it is apparent at once that the denial of fishing privileges to ineligible aliens has greatly conserved California's fast dwindling fish supply.

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<sup>2</sup>This case is number 517,578 in the Superior Court of the State of California, in and for the County of Los Angeles, and number L.A. 19,880 in the Supreme Court of the State of California. Counsel for Mr. Tsuchiyama and counsel in the case at bar are identical for all practical purposes. The *Tsuchiyama* case sought to enjoin the Fish and Game Commission from interfering with the commercial fishing activities of Mr. Tsuchiyama on the ground that section 990 of the Fish and Game Code is unconstitutional. Mr. Tsuchiyama prayed for \$10,000 actual damages for loss of profit he might have made during the fishing season. In addition to himself Mr. Tsuchiyama questioned the constitutionality of section 990 in behalf of 200 other alien Japanese fishermen.

The rationale of California's action in eliminating ineligible aliens from the privilege of engaging in commercial fishing is all the more apparent from the fact that the sardine fishery of California has practically become extinct from over fishing. Practically all of the sardine fish boats operating out of San Francisco and Monterey have moved to southern California waters and the sardine fishery is being over-fished and threatened with extinction.

If a state of facts can reasonably be conceived to sustain a law which is challenged as being unconstitutional on the theory of denial of equal protection the statute will be upheld (*Ferrante v. Fish and Game Commission*, 29 A. C. 363, 369).

Courts are limited in their power to strike down classifications made for the purpose of regulation. This Court has laid down the rules or limitations in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61. At pages 78 and 79 it is said:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in ques-



tion, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Moreover, in *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, this Court recognized the difficulty of stating a rule of classifications. It stated at page 429:

"It has never been found possible to lay down any infallible or all-inclusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. A very large number of decisions have dealt with the matter; and the nearest approach to a definite rule which can be extracted from them is that, while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some reasonable relation to the object of the legislation."

## V.

### THE INHERENT POWER OF THE STATE TO REGULATE ITS FISHERY RESOURCES APPLIES TO FISH BROUGHT INTO THE STATE FROM THE HIGH SEAS.

At page 9 of his petition Mr. Takahashi indicates that he is again concerned only with fishing upon the high seas and has forgotten about his claim to the right to fish in territorial waters. He states:

"The question remains whether the State may single out aliens from bringing into California for sale fish caught on the high seas outside its own territories."

And at page 10 he indicates that eligible aliens "make their living fishing on the high seas" and that only the ineligible aliens are denied this privilege.

Both Mr. Takahashi and the trial Court overlook the rule of law that the State has power to regulate with respect to fish brought ashore from the high seas. This rule has been iterated and reiterated, notably in the cases of *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422; *Johnson v. Gentry*, 220 Cal. 231; *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 Fed. (2d) 111; *Silz v. Hesterberg*, 211 U. S. 31; *Ex parte Maier*, 103 Cal. 476; *In re Delininger*, 108 Fed. 623; *Union Fisherman etc. Co. v. Schoemaker*, 98 Ore. 659, 193 Pac. 474; *Pacific Steam Whaling Co. v. Alaska Packers Assn.*, 138 Cal. 632; *Svenson v. Engelke*, 211 Cal. 500).

The reason for this rule is ably stated in the leading case of *Ex parte Maier*, 103 Cal. 476, at page 480, viz.:

"The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the closed season and foisted upon the market as game procured without the state, and owing to the practical impossibility in the great majority of cases of proving with certainty the source from

which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive."

Further support is found for this contention by reference to Section 1110 of the Fish and Game Code.<sup>3</sup> In general it provides that no person shall use a boat in territorial waters that delivers to any point outside of the State fish caught either in territorial waters or on the high seas without permission of the Fish and Game Commission. The constitutionality of this section has been upheld in *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. (2d) 56, and *Mirkovich v. Milnor*, 34 Fed. Supp. 409. Of interest here is some of the language of the Court in the former case where, at page 61, it is said:

"The lawful act of fishing outside the three mile limit obviously affects the natural resources of this state within the three mile limit. California has no power to extend the operation of its laws beyond its maritime frontier, but when the impact of activities outside the three mile limit necessarily adversely affects the public policy of this state, within the three mile limit, the state has the power to take steps against the

<sup>3</sup>The pertinent portion of section 1110 reads as follows:

"No person shall use or operate or assist in using or operating in this State or the waters thereof, any boat or vessel used in connection with fishing operations irrespective of its home port or port of registration, which fishing boat or vessel delivers or by which there is delivered to any point or place other than within this State any fish, mollusks or crustaceans which are caught in, or taken aboard said boat or vessel from, the waters of the Pacific Ocean within this State or on the high seas or elsewhere, unless a permit authorizing the same shall have been issued by the Fish and Game Commission."

persons responsible for such activities when they come within the limits of its jurisdiction."

Applying this rule to the case at bar, it would seem that if California has constitutional power to preclude ineligible aliens from fishing in state waters (as the opinion of the trial Court in the case at bar infers), then California may extend that prohibition to the fishing activities of ineligible aliens on the high seas, particularly when the catch is made the subject of commerce in this State.

## VI.

### SECTION 990 OF THE FISH AND GAME CODE IS NOT ANTI-JAPANESE AND RACIAL IN PURPOSE

It is well recognized that all presumptions and in-tendments favor the constitutionality of statutes. All doubts are to be resolved in favor of validity, and before an act may be declared invalid its conflict with the constitution must be clear, positive, abrupt and unquestionable. (*Pacific Gas and Electric Co. v. Moore*, 37 Cal. App. (2d) 91; *Rainey v. Michel*, 6 Cal. (2d) 259.) Quoting from 11 American Jurisprudence, page 725, the Court in *Pacific Gas and Electric Co. v. Moore*, 37 Cal. App. (2d) 91, said:

"It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it \* \* \* Thus,



if the proper construction of a statute is doubtful, the doubt must be resolved in favor of the law." (p. 94.)

The burden of overcoming such presumptions and intendments is cast upon the assailant; in this case, upon Mr. Takahashi. (5 Cal. Jur. 632.) In considering the constitutionality of a statute, the Court must limit itself to the facts as they appear on the *face of the enactment* and not go behind the statute and receive evidence from outside sources which would tend to impeach or overthrow the law. (*Los Angeles etc. District v. Hamilton*, 177 Cal. 119; *Galeener v. Honeycutt*, 173 Cal. 100; *Ojai v. Chaffee*, 60 Cal. App. (2d) 54.)

In enacting a law, the intent of the legislature is to be determined from what it *did*, that is, from the language of the statute itself unless that language is ambiguous. (*In re Monrovia Evening Post*, 199 Cal. 263; *Taylor v. Lundblade*, 43 Cal. App. (2d) 638.) Aside from the language of the statute, *no showing can be made as to legislative intent or object, and the opinions of members of the legislative body are not admissible to show what was intended or meant by the enactment.* (*Davies v. City of Los Angeles*, 86 Cal. 37; *Ex parte Goodrich*, 160 Cal. 410; *Leese v. Clark*, 20 Cal. 387; *In re Lavine*, 2 Cal. (2d) 324.)

Racism has no part in this case or at least should have none. But throughout the entire history of this case Mr. Takahashi has endeavored to inject the issue of racism and to throw a red-herring across the

path of the courts. He contends that section 990 of the Fish and Game Code is aimed at a single racial group, namely Japanese. Actually, of course, such is not true. The statute precludes *all persons* ineligible to citizenship from hunting and from fishing for profit or pleasure. (Stats. 1945, chapter 181.) All of the races ineligible to citizenship are included, and no one group in particular (such as Japanese) is singled out.

Let us assume for argument's sake that instead of Mr. Takahashi a Malayan had instituted a proceeding similar to the one at bar. He is as much entitled to challenge the constitutionality of section 990 as Mr. Takahashi and to contend that California is not empowered to deny ineligible aliens the privilege of hunting and fishing. It makes no difference whether he had ever engaged in the business of fishing in the past. He still may *assert his claim to enjoy the privilege* just as Mr. Takahashi has done. However, if this proceeding had been instituted by a Malayan, all discussion and argument anent the 1943 amendment (chapter 1100) barring alien Japanese and its effect on the existing statute would be irrelevant. Can it be contended by all persons ineligible to citizenship (other than natives of Japan) that the 1943 amendment was aimed at them and that the 1945 amendment continued to single them out by "description rather than by name"? Obviously they could not do so. All reference to Japanese, to the Report of the Senate Fact-finding Committee on Japanese Resettlement, and to the question of whether Japanese were the only ineligible aliens who fished commercially in the waters

bordering California would be beside the point and irrelevant. The only question would be whether California may preclude persons ineligible to citizenship from fishing and hunting. That should be the issue here, the nationality of the petitioner being only a coincidence.

Mr. Takahashi alleges in his original bill of complaint, as indicated above, that section 990 is unconstitutional "because enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race." (R. 2-3.) This was denied by the Fish and Game Commission. No proof was offered by respondent in support of his allegation and hence *the allegations of the answer must be taken as true.* (*McClatchy v. Matthews*, 135 Cal. 274; *Vanderbush v. Board of Public Works*, 62 Cal. App. 771; *Donohue Co. v. Superior Court*, 79 Cal. App. 41; *Brown v. Superior Court*, 10 Cal. App. (2d) 365.)

As no evidence was offered to support the allegation that section 990 is unconstitutional because "enacted" for the purpose and "administered" in a manner to discriminate against petitioner because of his race, the language of the statute alone furnishes the only indication of legislative intent and the denial of such allegations by the answer must be taken as true. Whatever imaginary doubts or fears that may arise from a consideration of the 1945 amendment (ineligibles) in the light of the 1943 amendment (alien Japanese) must be resolved in favor of the validity of the last legislative expression,

and it must be presumed that the California legislature intended, by a reduction of the number of persons eligible to hunt and fish, to conserve thereby the State's natural resources of fish and game.

Nor does the statement contained in the Report of the Senate Fact-Finding Committee on Japanese Resettlement of May 1, 1945 (see page 13 of Mr. Takahashi's petition) supply any criterion of legislative intent. That report represents the opinion of *only five* members of the California Senate; it does not speak for all other members of the Senate or for the members of the other branch of the legislature, that is, the Assembly. *The report was not offered or received in evidence in this case.* It could not have been so received. Moreover, examination of the report reveals it dealt primarily with the alien land laws and the Tule Lake riot. Japanese fishing boats, Japanese language schools and dual citizenship appear only as matters of minor concern. As shown hereinabove the opinions of members of the legislative body are not admissible to show what was intended or meant by the enactment. Assuming for the sake of argument only that the legislature intended by the 1945 amendment to continue an exclusive ban on alien Japanese by description rather than by name, nevertheless such a motive is not subject to judicial inquiry. (5 Cal. Jur. 640, sec. 66.) To the contrary, however, the history of the 1945 and 1943 legislation shows a desire to avoid the possibility of racial discrimination by extending the prohibition against fishing and hunting to all persons within a given class.



The constitutionality of the 1943 amendment is not at issue in this case. If the issue had ever been presented to a Court, undoubtedly it would have been considered in the light of *Korematsu v. United States*, 323 U. S. 214, 216, wherein it was said that while "legal restrictions which curtail the civil rights of a single racial group are immediately suspect", nevertheless, "pressing public necessity may sometimes justify the existence of such regulations".

One thing that stands out preeminently in this case is a disposition on the part of Mr. Takahashi, after the hearing in the trial Court, to try to find factual support for the judicial knowledge which the trial Court erroneously assumed in its memorandum opinion that "Japanese were the *only* aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California" (R. 17) (emphasis added) and when the trial Court also imputed such knowledge to the California legislators of 1945.

Fish Bulletin No. 49 of the Bureau of Commercial Fisheries of California to which Mr. Takahashi has referred at page 14 of his petition does not help him. The record of this case shows that the Fish and Game Commission has no statistics with respect to the eligibility to citizenship of persons who fish commercially. The statistics and data of the Fish and Game Commission relate to nativity alone. Herein perhaps lies the principal point which Mr. Takahashi overlooks. In short, nativity does not determine eligibility to citizenship. Eligibility to citizenship is determined by race. (The Nationality Act of 1940, section 302 et

seq., 54 Stat., pages 1137, 1140.) Thus, a Malayan, for example, may show British nativity and yet be ineligible to citizenship. This is shown by the answer of Miss Geraldine Connor to question No. 9 (R. 27-28.) Moreover, it should be borne in mind that all Orientals are not ineligible to citizenship. Chinese have been eligible since December 17, 1943. (57 Stat. 601.) Persons of races indigenous to India are eligible. (Public Law 483, 79th Congress, 2nd Session.) And, for that matter, alien Japanese who served in World War II have been eligible to citizenship from December 7, 1941 to June 30, 1946. (56 Stat. 182, 187; 58 Stat. 827; 59 Stat. 658.) This period includes 1943 and 1945 when the amendments to sections 990, 427 and 428 of the Fish and Game Code were made.

Mr. Takahashi concedes that there are ineligible alien commercial fishermen besides Japanese. He does not know how many, but he says the number is inconsequential. The Fish and Game Commission does not know the number nor does the trial Court. However, the decision of the trial Court was not based on an inconsequential number but rather on the ground that the Japanese were the *only* ineligible aliens, who engaged in commercial fishing. Assuming for argument's sake only that the number of ineligible alien fishermen is small, the consequences of such a number of fishermen was not raised by Mr. Takahashi in the trial Court and has no place in this case for the first time on appeal.

## VII.

**SECTION 990 OF THE FISH AND GAME CODE DOES NOT CONFLICT WITH ANY FEDERAL AUTHORITY OR POLICY WITH RESPECT TO FISHING ON THE HIGH SEAS OR COASTAL WATERS. NO SUCH FEDERAL AUTHORITY HAS BEEN ASSERTED.**

Mr. Takahashi takes the position for the first time that the so-called tidelands case, *United States v. California*, 332 U. S. 19, divests California of jurisdiction to regulate the taking of fish in its coastal waters or the landing of fish within its territorial limits which are taken on the high seas.

This is a peculiar position for Mr. Takahashi to take because he seeks from California a license to engage in commercial fishing in such waters. In other words, if he assumes that section 990 of the Fish and Game Code has no validity because the Federal Government has occupied the field of fishery on the high seas and coastal waters, then why does he need a license from California? It is our contention, however, that *United States v. California*, supra, has no application whatever to the case at bar. That case was considered in *Toomer v. Witsell*, 73 Fed. Supp. 371, by a Federal District Court of three judges in South Carolina and was held not to affect the fishery. A three judge District Court in California similarly held in *Northern California Fisheries Association v. Fish and Game Commission*, No. 27,821-G, Northern District of California, Southern Division.

The tidelands case was decided in June of 1947. Subsequently the Congress of the United States

clearly indicated that the Federal Government does not intend to attempt to regulate the Pacific Coast fisheries. On July 24, 1947 (subsequent to the tidelands case) the President approved H. R. 3598 (also known as Public Law 232—80th Congress, Chapter 316—1st Session) pursuant to which consent and approval of Congress is given to an interstate compact between the states of Washington, Oregon and California creating a Pacific Marine Fisheries Commission. A portion of Article IV of that compact is of interest here. It reads:

"To that end the commission shall draft and, after consultation with the advisory committee hereinafter authorized, recommend to the governors and legislative branches of the various signatory states hereto legislation dealing with the conservation of the marine, shell and anadromous fisheries in all of those areas of the Pacific Ocean over which the states of California, Oregon and Washington jointly or separately now have or may hereafter acquire jurisdiction. The commission shall, more than one month prior to any regular meeting of the legislative branch in any state signatory hereto, present to the governor of such state its recommendations relating to enactments by the legislative branch of that state in furthering the intents and purposes of this compact."

The Presidential Proclamation of September 28, 1945 does not in any way interfere with the right of the State to control its fishery resources. Neither Congress nor the Executive Branch of the Federal Gov-



ernment have manifested any interest therein. And, as indicated above, approval by the Federal Government of the pact between the three Pacific Coast States shows an inclination in just the opposite direction.

However, the fact that the United States has not occupied the field of regulating the fisheries in coastal waters, does not mean that it has the right to do so unless some Federal interest attached which would be held superior to the right of the State to regulate its own fisheries. Some cases, such as *Skiriotes v. Florida*, 313 U. S. 69, indicate that in the absence of an assertion of any right of control over the fishery by the Federal Government, the States may occupy the field. In all such cases, however, the language used appears to be pure dictum. It occurs to us that the better rule is announced in *Bayside Fish Co. v. Gentry*, 297 U. S. 422, to the effect that the States have supreme power and control over the fish and fisheries bordering their coasts.

In raising the point that section 990 of the Fish and Game Code conflicts with Federal policy with respect to fisheries on the high seas and coastal waters, Mr. Takahashi also overlooks the fact that a large amount of California fishing is carried on in inland waters, for example, the waters of San Francisco Bay, the Sacramento-San Joaquin River system and elsewhere throughout the State. Apparently he contends that he does not need a commercial fishing license to fish on the high seas and in coastal waters; although

he must concede, by failing to refer thereto, that he does need such a license to fish in inland waters of the State. If that is true, then Mr. Takahashi's position becomes all the more complex.

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### **CONCLUSION.**

For the reasons hereinabove set forth, it is respectfully submitted that the petition of Mr. Takahashi for a writ of certiorari should be denied.

Dated, San Francisco, California,  
February 17, 1948.

Respectfully submitted,

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# In the Supreme Court

OF THE  
United States

OCTOBER TERM, 1947

No. 533

TORAO TAKAHASHI,

*Petitioner,*

vs.

FISH AND GAME COMMISSION, LEE F.  
PAYNE, as Chairman thereof, W. B.  
WILLIAMS, HARVEY E. HASTAIN, and  
WILLIAM SILVA, as members thereof,  
*Respondents.*

On Writ of Certiorari to the Supreme Court of the  
State of California.

**BRIEF FOR RESPONDENTS.**

## **PRELIMINARY STATEMENT.**

We have read petitioner's brief of March 31, 1948, with some misgiving as it impresses us as a *potpourri* of contradiction and overstatement. For example, as shown hereinbelow, the petitioner claims in his brief he intends to fish on the high seas exclusively and in

the very next breath virtually concedes that at least some of his fishing must be done in territorial waters and that he, along with other fishermen, pay little attention to the imaginary three-mile ocean boundary line of California.

It should be noted that this case was submitted to the trial Court for decision without any proof from the petitioner in support of the allegations of his petition. For example, he alleged that section 990 of the Fish and Game Code is unconstitutional because "enacted for the purpose and administered in a manner to discriminate against persons, including the petitioner, solely because of his race" (R. 2). He also alleged that respondents "refuse to issue a commercial fishing license to petitioner solely because of his Japanese ancestry" (R. 2). The substance of the latter allegation is stated as a fact at page 4 of petitioner's brief. Such a statement, of course, is erroneous. Respondents will issue a license to an alien Japanese if he is eligible to citizenship. All these allegations were denied by respondents in their answer and, as petitioner offered no proof to support his position, the answer must be taken as true (*McClatchy v. Matthews*, 135 Cal. 274; *Vanderbush v. Board of Public Works*, 62 Cal. App. 771; *Donohoe Co. v. Superior Court*, 79 Cal. App. 41; *Brown v. Superior Court*, 10 Cal. App. (2d) 365).

Apparently the petitioner has realized that his failure to offer proof has placed him in an embarrassing position. For ever since the cause was submitted to the Supreme Court of California he has made a de-

terminated effort to inject into the record *arguendo* certain data, largely conclusions of counsel, which would be inadmissible if offered in the trial Court. Petitioner's current brief shows he is still pursuing the same course.

The petitioner attempts to prove on appeal a belief that alien Japanese were the only persons ineligible to citizenship who ever fished in California or out of California ports. This is a hypothesis which he not only failed to prove in the trial Court but also failed to allege. His action in this respect is a radical departure from the previously announced purpose of both sides<sup>1</sup> to settle the question as to the power of the State to preclude ineligible aliens from fishing. If indeed Mr. Takahashi is interested in such a determination it matters not whether he is Japanese, Malayan, Burmese, Javanese or racially a member of some other group ineligible to citizenship. It now appears, however, that he is concerned solely with himself as an alien Japanese and raises the hue and cry of racism and "war-born anti-Japanese prejudice" (brief, page 9) and similar expressions as a means to an end.

---

**THE OWNERSHIP DOCTRINE IS APPLICABLE TO THIS CASE**

The petitioner seeks to avoid the impact of what might be termed the ownership doctrine (pages 13 and 14 of his brief) by contending that the doctrine

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<sup>1</sup>Appellants' Opening Brief and Respondent's Brief in the Supreme Court of California, pages 35 and 1 respectively.



4

has no application to him because he "seeks to fish on the high seas and not in any area where the State of California can properly claim a proprietary interest \* \* \*" (brief, page 17).

This doctrine of sovereign ownership is succinctly stated in *LaCoste v. Department of Conservation*, 263 U.S. 545, viz.:

"The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use, and property rights that may be acquired therein."

This doctrine is too firmly established throughout the nation to admit further controversy and it has been extended to fish brought ashore from the high seas (see cases cited at page 27, respondents' brief in opposition to petition for writ of certiorari). As said in *Bayside Fish Flour Company v. Gentry*, 297 U.S. 422 at page 426, the rule is justified upon the ground

"\* \* \* that it operates as a shield against the covert depletion of the local supply \* \* \*"

This brings us to the very serious question as to the true intent and purpose of Mr. Takahashi with respect to California's "local supply" of fish. Apparently he concedes that California may classify aliens into two groups (eligibles and ineligibles) with respect to the fish over which sovereign ownership ex-

tends. At least the trial Court so held. Where, then, does Mr. Takahashi propose to do his fishing?

At the bottom of page 7 of his brief, he claims the "right to fish in the ocean". At page 8 he says he "seeks to fish in the open sea". At page 11 he expresses a desire to fish "in the open ocean". Such statements are not helpful.

At page 10 of his brief he makes "no claim to take fish in which the State of California has or rightly can claim a proprietary interest". At page 17 he states he "seeks to fish on the high seas and not in any area where the State of California can properly claim a proprietary interest in the fishery resources \* \* \*". Here we find the first clear statement that petitioner proposes to fish the high seas exclusively. However, that statement seems to be contrary to other statements in the brief. For example, at page 11 petitioner states that the "law" told him he could not fish "within three miles of the California coast" and so "he was cut off from his occupation". Again at pages 11 and 12, it is said "that the petitioner and the other alien Japanese fishermen \* \* \* earned their living from a fishery only a portion of which \* \* \* lies within three miles of the shore." Such assertions flatly contradict his amended pleading that he fished the high seas exclusively since 1915. In the light of such statements can it truthfully be said that Mr. Takahashi proposes to fish the high seas only?

But actions speak louder than words. The record clearly shows that Mr. Takahashi intends to fish in

territorial waters as well as on the high seas. The trial Court granted him a judgment directing respondents to issue him a license to engage in fishing on the high seas (R. 7). He was not satisfied with that. He subsequently made an *ex parte* motion to the trial Court for an amended judgment directing the issuance of a commercial fishing license without qualification as to the place of use (R. 21). The action of the petitioner in such respect manifests his intention to fish in territorial waters as well as on the high seas. Moreover, the supplemental pleading in the companion case of *Tsuehyama v. Fish and Game Commission* demonstrates the impossibility and impracticability of limiting commercial fishing activities to territorial waters alone. This pleading was signed by A. L. Wirin, Esq., counsel for petitioner herein, and reads in part as follows:

"It is impossible, and, in any event, impractical for the plaintiff to determine, while engaged in commercial fishing for sardines, where the dividing line between the so-called 'high seas' and the so-called 'territorial waters' are or may be.

"From 1925 until 1942, while engaged in commercial fishing, under licenses issued by the Fish and Game Commission during the sardine season, the plaintiff has engaged in fishing said sardines both from high seas and the territorial waters of the ocean.

"Unless permitted to fish for sardines, not only on the high seas but in the territorial waters, the plaintiff would be unable to fish effectually and efficiently for sardines, and would be de-

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prived of the right to earn a livelihood as a commercial fisherman in the occupation followed by him since 1925.

"The foregoing applies to, and is true of, all of the Japanese fishermen in whose behalf this Complaint is filed as listed in Exhibit A attached to said Complaint, except only that each of said persons has engaged in commercial fishing heretofore, under commercial fishing licenses issued by said Commission, for varying periods.

"Wherefore, the plaintiff prays that the defendants be enjoined as prayed for in said Complaint on file herein and that the defendants be additionally restrained from interfering with the right of the plaintiff, and with the right of the persons named in Exhibit A, attached to said Complaint, to engage in commercial fishing and to bring fish caught on the high seas or in the territorial waters of the ocean, in a fresh state, ashore to any point in the State of California.

A. L. WIRIN and JOHN MAENO

By A. L. WIRIN (signed)

A. L. WIRIN

Attorneys for Plaintiff"

Mr. Wirin forwarded the aforesaid pleading to Judge Willis (trial judge) in a letter dated August 13, 1946, with the following explanation of his reasons for forgetting about the high seas and conceding that fishing is done in territorial waters. Said Mr. Wirin:

"A word of explanation: The enclosed Memorandum (of points and authorities) contains material not to be found in the plaintiff's memorandum in the Takahashi case, with respect to Sec.



990 of the Fish and Game Code, as affecting the right to fish in territorial waters, i.e., not in waters constituting 'high seas'.

After worrying about the problem considerably, I am satisfied that my efforts to limit the issues before this Court to the right to fish on the high seas, must be abandoned, if fishermen of Japanese descent are to have the right to fish, at least in the forthcoming sardine season, efficiently, and without the threat of criminal prosecution in the event they guess erroneously as to the precise point in the waters off the coast of California which divides 'territorial waters' from 'high seas'." (Parentheses supplied. )

In his original petition, Mr. Takahashi alleged that he engaged in the occupation of *commercial fishing in California* since 1915 (R. 1). This petition was verified by him, although the verification does not appear in the printed record. When the case was called for hearing in the trial Court, he abruptly changed his position to high seas fishing. After he got a judgment for a license to permit him to fish the high seas, he swung back to his original position and asked for and obtained (*ex parte*) a judgment for a license to fish territorial waters as well as those of the high seas.

At page 12 of his brief, the petitioner emphasizes a statement in Fish Bulletin No. 15 to the effect that "The fishermen, the fish, and the ocean currents pay little attention to these lines", that is, territorial ocean boundary lines. We heartily agree that Mr. Takahashi, being a fisherman himself, would pay little attention to the three mile seaward boundary of California.

It serves petitioner no useful purpose to urge that the so-called sovereign ownership doctrine has no application to the case at bar because only a small portion of the fishery lies within state waters. This is a novel point, raised for the first time in this Court. In the first place, there is no evidence in this case to support such a fact. Secondly, the assertion is erroneous. In this connection we quote in full a communication to us dated April 1, 1948, from Mr. Richard S. Croker, chief of the Bureau of Marine Fisheries, Division of Fish and Game of California. His statements are entitled to the same weight as any printed matter contained in Biennial Reports of the Fish and Game Commission referred to by petitioner for the reason that the authors of such printed matter occupied the same position as Mr. Croker as chief of the Bureau of Marine Fisheries. Mr. Croker says:

"My attention has been invited to certain representations contained in the brief of Mr. Takahashi, to be filed in the Supreme Court of the United States in support of his petition for a commercial fishing license in this State.

In that brief he states that 'a substantial if not a major portion of the California fish catch is taken' on 'the open sea' (see page eight). By reference to the open sea, he probably means the high seas, or in waters outside the State's territorial jurisdiction. At page thirteen of the same brief it is stated from Fish Bulletin No. 48 that '52 per cent of the sardine catch for the Monterey area occurred within three miles of shore, while 36 per cent of the San Pedro (Los Angeles) catch was attributable to the coastal

waters.' It is also stated that about 20 per cent of the catches for adult sardines off Orange and San Diego Counties are made within the three-mile limit.

It is difficult to determine the place, with any degree of accuracy, where the ocean fishes are caught for the reason that many of the fishermen themselves do not keep accurate records of their position while at sea, and themselves do not know or report accurately the places where the fish are caught. From what scientific data the Bureau of Marine Fisheries has available, and from studies made of the habits of the various commercial fishes of California, it is safe to say that approximately one-half of the sardines brought into California ports are taken within territorial waters of the State, and the remaining one-half are taken outside territorial waters or on the high seas. The same ratio applies to mackerel. The salmon catch occurs mostly inside territorial waters, approximately 90 per cent. On the other hand, tuna and albacore which in years gone by were taken in large quantities in territorial waters are now caught almost entirely on the high seas. In these cases the boats even travel to foreign countries or thousand of miles to catch the tuna. The lobster fishery is all inside territorial waters of the State; and the same applies to crabs and other forms of mollusks and crustaceans.

The principal species taken by fishermen operating out of southern California ports are sardines and mackerel.

It is my opinion that the large influx of commercial fishermen to California during the war



years has added to the current problem which exists as to sardines. At this writing the sardine fishery of California is threatened with extinction. For the last two years the catch has been at a seriously low level. Sardine fishing boats which normally operated out of San Francisco and the Monterey areas were obliged to go to southern California waters to prey upon the fishery there. As a result, practically all the sardines taken for the last season (1947-1948) were fish of younger year classes which had not reached the age at which migration to the north commences. Many were spawned in the early part of 1947, and were taken in the fall of that year and in the winter of 1948. As a result, this fishery has not had a chance to rehabilitate itself and it is quite probable that a blanket prohibition will have to be put on the entire take of sardines to protect it from extinction. During the 1947-1948 season, and during the sardine season for 1946-1947 the reduction and packing plants operating at San Francisco and Monterey were obliged in the main to get their fish by shipments from southern California by truck. This is a very wasteful and expensive way of carrying on the business, as the fish are subject to spoilage in transit.

Yours very truly,  
 (SIGNED) RICHARD S. CROKER,  
 RICHARD S. CROKER,  
 Chief,  
 Bureau of Marine Fisheries.

RSC:hn"

It thus appears that the major portion of California's fisheries is not limited to the high seas. Even so,



all indices of state sovereign ownership attach when fish are brought ashore from the high seas. *Bayside Fish Flour Company v. Gentry*, 297 U.S. 422, upheld a California statute placing a limitation on the use of sardines brought into this State even though from the high seas. This Court said (page 426);

"Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 39, 40, 53 L. ed. 75, 79, 29 S. Ct. 10."

To the same effect it was stated in *Mirkovich v. Milnor*, 34 Fed. Supp. 409, 412-413:

"The insurmountable difficulties attendant upon policing the waters of the state from the coast to the imaginary three mile limit, wherever fishing operations occur; the impossibility of distinguishing fish taken in state waters from those taken from without, or between vessels fishing within from those fishing beyond the state's limits; the consequent ease, with which fraud and deceit might be practiced by vessels delivering fish taken from the fisheries of the state to points outside the state on the pretext of operating solely beyond the three mile limit—these considerations alone justify the provisions of Section 1110 of the Fish and Game Code as a proper exercise of the police power of the State of Cali-

fornia, having reasonable relation to the object of their enactment, and reasonably calculated to render effective the state's power of control over the fish supply within its territorial waters."

And as stated in *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. (2d) 56 at page 61,

"The lawful act of fishing outside the three mile limit obviously affects the natural resources of this state within the three mile limit. California has no power to extend the operation of its laws beyond its maritime frontier, but when the impact of activities outside the three mile limit necessarily adversely affects the public policy of this state, within the three mile limit, the state has the power to take steps against the persons responsible for such activities when they come within the limits of its jurisdiction. This statute does not make punishable acts committed outside the jurisdiction of California. It operates only when boats which fish outside its jurisdiction (but whose acts adversely affect the interests of this state) come within this state's jurisdiction. As was said in *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 426 (56 S.Ct. 513, 80 L. Ed. 772), in upholding a somewhat similar statute: " \* \* \* its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy." (See, also, *Silz v. Hesterberg*, 211 U. S. 31 (29 S.Ct. 10, 53 L.Ed. 75).)"

Similarly it was held in *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 Fed. (2d)

111 that the State may qualify the use made of fish brought in from the high seas in order to conserve the fish which are taken from its own waters.

Moreover, the concept of state sovereign ownership over the fishery resources adjacent to the coast has been extended by the proclamation of the President of the United States of September 28, 1945 (59 Stat. 885). In other words, by authorizing the establishment of conservation zones on the high seas, ownership of the fish on the high seas adjacent to the coast of the United States is asserted. It follows that such ownership would lie with the respective sovereign states because they, in turn, are the owners of the migratory fish which frequent their shores (see this brief, post).

We submit that the petitioner intends to and will fish where he finds them, irrespective of whether they are in territorial waters of California or waters of the high seas.

As it is impossible to distinguish between fish taken from within or without territorial waters, California may rightfully assert sovereign ownership over all fish brought to its shores by fishing boats and prohibit aliens ineligible to citizenship from fishing without violating the Fourteenth Amendment of the Federal Constitution (cf. *Lubetich v. Pollock*, 6 Fed. 2d. 237; see also pages 13, 15, 16 and 17, respondents' brief in opposition to petition for writ of certiorari).

## FISHING IS NOT A COMMON OCCUPATION.

The dissenting opinion of Mr. Justice Carter of the Supreme Court of California defines fishing as a common occupation or as an ordinary means of livelihood and he refers to the *Encyclopaedia of Social Science*, Volume III, page 266, for support. A short quotation is given from that *Encyclopaedia* to the effect that fishing is one of man's earliest sources of food and is still one of the most important means of earning a livelihood (R. 53). The discourse in the *Encyclopaedia* under the heading of "Fisheries" reviews the history of fishing and fisheries from early times and concludes with the statement that improvements in the mechanics of the craft have hastened the exhaustion of the fisheries and hence have proved the need for regulation and conservation. It should be added that the vast increase in the number of fishermen have likewise hastened exhaustion and called for regulation to preserve the fisheries, such for example, as the action taken by California in limiting the number of persons eligible to tap its fishery resources.

- o Perhaps in early times fishing was a common occupation, but it has now become uncommon and restrictive. As pointed out in our previous brief, statutes limiting the number of persons to fish have repeatedly been upheld. The privilege of fishing has been extended to citizen-residents of a state, to non-resident citizens and to aliens and declarant aliens. Others have been constitutionally denied the privilege. Statutes prescribing different license fees for different classes



of persons have been upheld and these, together with the other things just mentioned, show beyond doubt that fishing is no longer a common occupation in which one may lawfully engage as opposed to the will of the state. Indeed, the state may prohibit fishing entirely, either for pleasure or profit. For example, years ago sturgeon were prevalent in California and were sold commercially. In order to protect the species from complete extermination, sturgeon now cannot be taken at all. (Section 725, Fish and Game Code). This section provides "Sturgeon may not be taken or possessed at any time." Similarly, striped bass at one time were open to commercial fishermen. Now, however, they ~~are~~ cannot be taken for such purpose and sold on the market (Section 696, Fish and Game Code). This section provides: "It is unlawful to buy or sell striped bass. The possession or transportation of striped bass for the purpose of sale is hereby prohibited." These restrictions take fishing out of the category of a common occupation.

Under what theory it can be claimed that fishing is a common occupation or an ordinary means of earning a livelihood is beyond perception. No authority has been cited in support thereof by the petitioner. The only thing he has done is to make an assertion to such effect and to parallel fishing with cooking and other forms of labor which may not be prohibited or restricted, at least, in aid of conservation.

Fishing differs from other forms of labor in that the fishery can become a wasting asset (cf. Mr. Croker's report, supra). The fisheries are a natural

resource, like minerals, timber, etc. While fishing is an ancient industry, so is mining. That industry runs back to the eighth man from Adam (Genesis, 4th chapter). Yet the United States has in effect declared that mining is no longer a common occupation in which all men engage. For only citizens of the United States and *declarant aliens* are permitted to tap the mineral resources of this country by location. (Title XXXII, Chap. VI, Revised Statutes of the United States, section 2319; 30 U.S.C.A., sec. 22). Thus aliens ineligible to citizenship, such as Mr. Takahashi, cannot exploit the mineral wealth of this nation. Mining as an industry is not a "common occupation" and, for that matter, neither is the business of exploiting the fishery resources of California.

That this Court in *Truax v. Raich* did not intend commercial fishing to be classified as a common occupation or other means of livelihood is indicated in *Ex parte Gilletti*, 70 So. 446; 70 Fla. 442. In that case Florida required all aliens and nonresident aliens to pay a \$10 license fee for the privilege of fishing or taking oysters. The petitioners, as aliens, were arrested and imprisoned for removing the oysters without a license. They sought habeas corpus. The Court denied the writ stating:

"As so construed and applied, the statutory provision does not violate organic or treaty right. The state may, without denying 'to any person within its jurisdiction the equal protection of the laws,' justly discriminate in favor of its citizens in regulating the taking for private use of the common property in fish and oysters found in

the public waters of the state, where such regulations have a fair relation to and are suited to conserve the common rights which the citizens of the state have in such fish and oysters as against aliens and non-residents of the state. The equal right of all persons who reside in a state whether citizens or aliens to labor therein does not include an equal right of an alien to participate in the common property and privileges that are peculiar to citizens. The statute does not purport to discriminate against aliens and nonresidents with reference to private property rights or the right to labor or to deal in fish and oysters after they lawfully become private property. See *Patson v. Comm. of Penna.* 232 U. S. 138; *Truax v. Raich*, 239 U. S. 33."

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**PETITIONER HAS NO "RIGHT" TO EARN HIS LIVING BY  
COMMERCIAL FISHING IN CALIFORNIA.**

Under the heading of No. II petitioner claims that he has been denied the "right" to earn a living by commercial fishing solely because of his alienage and hence is denied equal protection of law. As previously pointed out, no one has the right to earn his living by commercial fishing against the will of the state (pages 18-20, respondents' previous brief). It is a privilege to engage in commercial fishing, and the privilege may be denied by the state in whole or in part at any time.

Under this heading the petitioner again quotes at length from *Truax v. Raich*, 239 U.S. 33 (pages 18, 19, 20 of his brief) holding in effect that a state can-

not deny lawful inhabitants the ordinary means of earning a livelihood solely because of their race. That case, as we previously indicated, expressly excludes from its purview such occupations as fishing, either for pleasure or profit. The *Truax* case cited *McCready v. Virginia*, 94 U.S. 391, which involved the planting and exploitation of oyster beds. This Court held such a privilege might be reserved by Virginia to its citizens alone. In other words, Virginia went further than California has done. Virginia excluded both non-resident citizens and all aliens from the privilege of engaging in the business of planting and harvesting oysters. California allowed all except ineligible aliens to hunt or fish.

*Foster Fountan Packing Co. v. Haydel*, 278 U. S. 1, does not help the petitioner. That case involved a statute of Louisiana which prohibited the exportation of shrimps if the hulls, heads and shells had not been removed. Its purpose was to prevent the shrimps from being processed or packed outside of Louisiana. It had been customary for the shrimps to be packed in Mississippi. The statute in that case obviously was not in aid of conservation. No limitation was placed upon the original take of the shrimps. Section 990 of the Fish and Game Code, however, pares down the number of persons who may take fish and thereby tends to conserve the fisheries by limiting the take.

*Pavel v. Pattison*, 24 Fed. Supp. 915, also is not in point. In that case Mr. Pavel owned 14,000 acres of swamp lands in Louisiana suitable only for trapping



alligators in summer and fur bearers in winter. The Court took notice of the fact that the alligators and the fur bearers had *no food value*, that they were *predators* and hence the restriction on their taking was not in aid of conserving a food source. The Court said (page 918) the situation in this respect is different from cases like *Geer v. Connecticut* wherein the hunting and capturing of game involved entirely matters of food and sport.

*Patsone v. Pennsylvania*, 232 U.S. 138 upheld a statute prohibiting aliens from killing game and possessing arms. In discussing this case the petitioner says California does not base or claim that the denial of the fishing privileges to ineligible aliens is based on conservation. He states it is based on dislike and nothing more (page 22). This, of course, is but the idle conjecture of petitioner and his counsel.

*Skiriotes v. Florida*, 313 U. S. 69, cited at page 14 of petitioner's brief holds that the State may extend its penal statutes to its citizens upon the high seas even though there is no expressed declaration to such effect. If this is true, then California should be able to extend its penal statutes to persons residing within its jurisdiction, such as Mr. Takahashi, and to his operations while fishing on the high seas with as much propriety as it can to its own citizens. If California cannot enforce its statutes with respect to fish and game against resident aliens fishing on the high seas, then obviously its own citizens are discriminated against and placed in an unfavorable position to the resident alien who seeks the equal protection of Cali-

ifornia law but claims that the State has no right to control his fishing activities on the high seas. In short, Mr. Takahashi would eat his cake and have it too.

**SECTION 990 OF THE FISH AND GAME CODE IS SUPPORTABLE  
AS A CONSERVATION MEASURE.**

The petitioner contends that the 1943 and 1945 amendments to section 990 of the Fish and Game Code are not supportable as conservation measures; and that he is denied the right to fish because of his alienage. In the first place the 1943 amendment is not before this Court for consideration. As we indicated at page 34 of our previous brief, had the 1943 statute ever come before the Court it undoubtedly would have been considered in the light of the clear and present danger doctrine announced in *Korematsu v. United States*, 323 U. S. 214.


The 1943 amendment to section 990 prohibited the issuance of commercial fishing, sport fishing and hunting licenses to alien Japanese (Statutes, California, 1943, chapter 1100). This statute was approved by the Governor of California June 8, 1943. It was introduced in January of the same year. It should be borne in mind that at that time the *Korematsu* case had not been decided by this Court. It was decided December 18, 1944. In other words, California did not know whether the military orders relating to Japanese concentration would be upheld. For all California knew the Japanese might have been returned. It cannot be

doubted that in 1943 there was a clear and present danger not only to California but to the United States as well from the operation of Japanese fishing boats. Moreover, if the Japanese had been returned to California during the war, a statute granting them hunting privileges (with the right to carry a rifle) would be manifestly absurd.

The contention of the petitioner at page 25 of his brief that the 1943 amendment was merely a new outburst of anti-Japanese hysteria is not sound. If California was hysterical in 1943 it had good reason to be. This applies to the entire nation.

The petitioner falls back on the argument that the 1945 amendment was merely a continuance in effect of the 1943 amendment in that the Japanese were singled out by description in 1945 rather than by name. This contention rests upon his assumption that Japanese were the *only* ineligible aliens who ever fished in California waters. The petitioner asked the trial Court to take judicial notice of this. The Supreme Court of California correctly held, and the dissenting opinion does not question, the holding, that the trial Court erred when it assumed judicial knowledge that Japanese were the only ineligible aliens who fished in California waters and such was known to the legislators in 1945.

The petition is devoid of any allegation that Japanese were or are the only aliens ineligible to citizenship who ever engaged in commercial fishing or any kind of fishing in California. Such an allegation would



have been denied. Nevertheless after this case had been argued, briefed and submitted to the Supreme Court of California, the petitioner presented to that Court Fish Bulletins Nos. 49, 57, 58 and 59 together with his analysis thereof. More of these Bulletins are referred to and analyzed in his current brief. We had and still have no objection to a consideration of any statistical information compiled by the Fish and Game Commission with respect to persons holding commercial fishing, hunting, or angling licenses.

Apparently dissatisfied with the statistical data obtained and with his analysis thereof, the petitioner called for the deposition of Miss Geraldine Connor as his witness and submitted written interrogatories to her in the companion case of *Tsuchiya v. Fish and Game Commission*.<sup>2</sup> The petitioner's questions are numbered 1 to 11 inclusive and the respondents proposed cross-questions 12 to 16:

Still dissatisfied with the results of the deposition, the petitioner through counsel undertook an independent examination of the records of the Fish and Game Commission pertaining to commercial fishing license applications. This investigation was made by Mr. Howard Goldstein, an employee of the petitioner or of his southern California counsel. We believe he is the same Howard Goldstein who is referred to at page

<sup>2</sup>The *Tsuchiya* case is referred to at page 24 of respondents' brief in opposition to writ of certiorari. By stipulation the testimony taken in that case was incorporated into the record of the case at bar (R. 25-29). That case and this case are identical except for the relief prayed.



28 of petitioner's current brief. Mr. Goldstein's investigation was not made jointly with respondents or their representatives. Hence we are not in a position to vouch for the authenticity of his work and we seriously question the accuracy and competency of his "Survey" which was made at the instance and request of petitioner. Mr. Goldstein's conclusion that other than alien Japanese only three fishermen (two Koreans and a Guamese) were licensed to fish commercially between 1930 and 1944 (petitioner's brief, pages 27, 28) is not only questionable but certainly is not binding on respondents. Mr. Goldstein's "Guamese" happens to be a Mr. Joe Santos Sr. who was born in Guam. Goldstein concludes from that fact alone that Mr. Santos is ineligible to citizenship. From his name, however, it would appear that Mr. Santos is of Portuguese ancestry, in which case the mere fact he was born in Guam would not preclude him from citizenship. One of Mr. Goldstein's "Koreans" is a Mr. Hyeng Kim whose application shows he applied for "first" citizenship papers. The magazine "Pacific Citizen" is the official publication of the Japanese American Citizens League and is not available at any public library in the San Francisco bay area.

None of the records of the respondents give or purport to give the citizenship eligibility of applicants for commercial fishing licenses. The statistical data refers to nativity alone. Herein, perhaps, lies the principal point which Mr. Goldstein and the petitioner have overlooked. In short, nativity does not determine eligi-

bility to citizenship. Such eligibility is determined by race, not by nativity or place of birth (The Nationality Act of 1940, sec. 302 et seq. 54 Stat. pages 1137, 1140). Thus a person may show, for example, British nativity and yet be ineligible to citizenship. This is demonstrated by Miss Connor's answer to petitioner's question number 9 (R. 27-28).

How or under what theory the trial Court acquired such judicial ken is unknown to respondents, particularly as they themselves, as the licensing agents, are unaware of such facts, if indeed they are the facts. Despite the special knowledge on the subject which may be imputed to them, respondents are unable to say that Japanese were the only ineligible aliens who commercially fished in waters of this state or on the high seas adjacent to its coast.

Furthermore, it should be noted that the trial Court limited its judicial knowledge of the commercial fishing by ineligible aliens (Japanese) to "ocean waters bordering on California" (R. 17). What about inland waters such as the Sacramento and San Joaquin Rivers and San Pablo, Suisun and San Francisco Bays? Those waters have been fished commercially for years. Can it be said that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in such inland waters? The respondents do not think so and question the power of the courts to take judicial knowledge thereof, or knowledge that Japanese were the only ineligible aliens who fished in the ocean waters adjacent to this State. In California the

three material requisites of the assumption of judicial knowledge are (1) the matter must be of common and general knowledge, (2) it must be well established and authoritatively settled, that is, not doubtful or uncertain and (3) it must be within limits of the Court's jurisdiction (10 Calif. Juris. 693, sec. 21). Possibly the latest expression on this subject by California Courts is to be found in *Berry v. Chaplin* 74 Cal. App. 2d. 669. In that case the Court refused to take judicial knowledge that Charles Chaplin (of the moving picture industry) is a man of wealth and opulence.

Another problem arises in this case in regard to the assumption of judicial knowledge that the commercial fishing activities of ineligible aliens were limited to Japanese. That problem comes from a consideration of the 1945 amendment (chapter 181) as a whole. It has been pointed out in our previous brief (page 5) that the chapter amended not only section 990 but also sections 427 and 428 of the Fish and Game Code. These last two sections relate to hunting and sport fishing licenses. To reach the conclusion of the trial court that by the 1945 amendment "the Legislature intended \* \* \* to eliminate alien Japanese \* \* \* by means of description rather than by name" (R. 17), would require the assumption of additional judicial knowledge that Japanese were the only ineligible aliens who hunted or fished for pleasure in California. Obviously, this would impose too great a tax upon the imagination. The intent of the legislators of 1945 in enacting chapter 181 should be gathered from the whole chapter and not just from section 3 thereof relating

to commercial fishing licenses (*Robinson v. Mitchell*, 159 Cal. 581). Consequently it cannot be said that the 1945 amendment (chapter 181) was aimed at the elimination of alien Japanese by description rather than by name in the absence of knowledge that Japanese were the only ineligible aliens who hunted or fished for pleasure or profit in California. Commercial fishing activities cannot be considered alone if judicial knowledge is to be invoked (cf. *Hellmich v. Hellman*, 276 U. S. 233).

The Report of the Fact Finding Committee of the Senate cited on page 26 of petitioner's brief was not admitted in evidence in the case nor for that matter would it be admissible as competent evidence. The motives which prompt the legislature to enact a law cannot be made the subject of judicial inquiry for the purpose of invalidating or preventing the full operation of the law (*Plum v. State Board of Control*, 51 Cal. App. 2d, 382, 124 Pac. 2d 891).

Moreover, the Report represents the views of only five of the legislators of 1945. That year there were 120 members of the State legislature, of which 40 were senators and 80 were assemblymen. When the 1945 amendment reached the Assembly (that is, the lower house) it was referred to the Committee on Fish and Game and that Committee considered the bill, solely from the point of conservation by reducing the number of persons who are preying upon the fishery reserves of this State. In support thereof we quote below a communication from the Honorable Thomas M. Irwin, a member of the California Legislature.



January 16, 1948

Hon. Fred N. Howser  
Attorney General of California  
600 State Building  
San Francisco 2, California

Dear Sir:

I am a member of the Assembly of the California Legislature and was such during the session of 1945. During that session I was a member of the Assembly Committee on Fish and Game to which all bills relating to fish and game were referred. Senate Bill No. 413 was introduced in the Senate January 23, 1945. It passed that House and was referred to the Assembly Committee on Fish and Game on April 4, 1945. That Bill passed the Assembly and was signed by the Governor and became Chapter 181, Statutes of California of 1945.

I was present at the meetings of the Assembly Committee on Fish and Game at the time when Senate Bill 413 was discussed. The Committee did not consider the Bill from any constitutional aspect but reviewed and considered it solely from the standpoint of conservation of fish and game. It was the consensus of opinion of this Committee of 17 members that by further increasing the number of persons ineligible to hunt or fish for pleasure or profit, California wildlife would be the better conserved. The disastrous results to this State of overfishing by commercial fishermen during this and the past few years, particularly in respect to sardines, has shown the wisdom of the action of the Legislature in passing Senate Bill No. 413 and it is possible that still more per-

sons may have to be denied the privilege if California's commercial fisheries are to survive.

Yours very truly,  
(Signed) Thomas M. Erwin

If the Report of the Senate Committee is entitled to consideration, the statements of Mr. Irwin are entitled to equal weight.

At page 29 of his brief the petitioner has prepared some tables purporting to have been compiled from certain Fish Bulletins. The figures do not tell the ratio between alien Japanese commercial fishermen and other aliens. For this reason we have set below a table which should be of greater service to the Court in this respect. The table is compiled from Fish Bulletins 57, 58, 59 and 63.

License year	Total aliens (exclusive of de- clarant aliens)	Japanese	Nativity not given
1939-1940	1579	807	153
1940-1941	1395	470	129
1941-1942	1343	371	40
1942-1943	414	-----	24
1943-1944	528	-----	117
1944-1945	574	-----	103
Totals for first 3 years		1648	322

The percentage or ratio of alien Japanese commercial fishermen to other aliens whose nativity was not given (presumably ineligible to citizenship) for the foregoing first three license years is approximately 89 to 11. This does not justify the assumption of judicial

knowledge that alien Japanese alone fished commercially from the waters of this state.

Fish Bulletin No. 57, page 18 shows that out of a total of 1579 alien fishermen (exclusive of declarant aliens) in the 1939-1940 license year 807 were Japanese and 153 were grouped as all other foreign born without specific reference to nationality. Fish Bulletin 58, page 25, shows that out of a total of 1395 alien commercial fishermen other than declarant aliens licensed for the year 1940-1941, 129 were persons whose nativity was not known and 470 were alien Japanese. The figures with respect to Japanese is computed by subtracting 289 United States born Japanese (page 25) from a total of 759 Japanese commercial fishermen (page 24).

For the year 1941-1942 Fish Bulletin No. 59 reveals that there were 40 aliens whose nativity was not recorded out of a total number of 1343 alien fishermen other than those seeking citizenship. Of the latter number apparently 371 were alien Japanese (699 minus 328, pages 22 and 23). For the license year 1942-1943 there were 24 aliens whose nativity was not recorded out of a total of 414 non-declarant alien fishermen (p. 23). There were no Japanese fishermen that year.

In Fish Bulletin No. 63 (page 36), it is shown that out of the total number of 528 alien fishermen (exclusive of declarant aliens) in the 1943-1944 license year, 117 did not specify citizenship or nativity. For the 1944-1945 license year the ratio was 574 to 103. It

should be noted that in the last three license years mentioned there were no Japanese fishermen, yet the number of licentiates increased.<sup>3</sup>

Quotations from the Biennial Reports of the Division of Fish and Game which are set forth in petitioner's brief are mere statements of statistical facts and information. The petitioner urges that because the fishing industry of California increased remarkably during the war years, it shows that California is well satisfied with such growth and desires it to be continued. Hence they urge that the reduction in the number of fishermen is not germane to conservation and belies the argument that a reduction in the number of commercial fishermen is desired for such a purpose. The fallacy of such an argument lies in the fact that the Biennial Reports show conditions as they exist and not conditions to be desired. Briefly the situation in California with respect to its fisheries is this. The number of commercial fishing licenses sold in California increased from 7,665 to 12,312 between the license years 1937-1938 and 1946-1947 (Fish Bulletin No. 67, page 32). This was due to a persistent demand for food particularly during the war years. This demand stimulated an influx of fishermen. Despite the large increase in the number of fishermen the overall catch for 1945 dropped (Fish Bulletin No. 67, page 7) and in fact was lower than it was in the previous 11 years. The 1946 catch showed a still further decrease of more than a quarter million pounds (Fish Bulletin

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<sup>3</sup>The Fish Bulletins referred to will be lodged with the clerk of the Court.



No. 67, page 6 and 7). In other words, we here have a situation where the number of commercial fishermen is increasing yet the overall catch is decreasing. The explanation of this lies in the obvious fact that the fisheries are being exhausted. In Fish Bulletin 67 at page 7 reviews the decline in the overall take of fish and then says:

"The explanation of the foregoing lies in the fact that sardines have dominated the catch for 20 years, averaging about 75 percent of all landings. Therefore the trend of the sardine catch determines the trend of the total catch, thus obscuring the tenor or the remaining fisheries. The decline in the 1945 and 1946 total catches was due to the failure of the sardine fishery which yielded a total lower than any year since 1933."

The catch in 1947 in California presents a still gloomier picture.<sup>4</sup> It appears that the sardine fishery of California upon which the other fisheries depend is threatened with extinction. Sardine fishing boats normally operating out of Monterey and San Francisco now travel to southern California ports to catch the remaining sardines. The fish are trucked from Los Angeles to northern ports (a distance of approximately 500 miles) in order to supply the northern packing plants. This is not only economically unsound but in many instances results in a waste of the fish themselves as they spoil before reaching the plants. It is obvious therefore that any reduction in the number of fishermen tends to conserve if not

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<sup>4</sup>See the communication from Mr. Richard Croker, this brief, *supra*.

save entirely the sardine fishery of California and the fisheries dependent upon sardines from complete extinction. Therefore when the petitioner states at page 32 of his brief that the authorities of California look with favor upon the increase in the number of ocean fishermen he is wandering far afield.

It is a rule of long standing that the United States Supreme Court will accept the construction placed on a state statute by the highest court of that state. (*S.R. A. Inc. v. Minn.*, 327 U. S. 558; *International Harvester Co. v. Wisconsin*, 322 U. S. 435; *Prince v. Mace*, 321 U. S. 158; *Supreme Lodge etc. v. Meyer*, 265 U. S. 30; *Morehead v. N. Y., ex rel. Tilapido*, 298 U. S. 587). The highest court in California has construed section 990 of the Fish and Game Code as being an enactment in aid of conservation, that conservation was the aim and purpose of the statute and that the reduction in the number of persons eligible to hunt and fish bears a reasonable relation to the object sought to be obtained, namely the conservation of the State's commercial fisheries as well as the conservation of its game and sport fishes. In the light of these decisions we submit that this construction should be followed by this Court.

The construction given by the highest state Court is conclusive on the United States Supreme Court where the question involved is whether such a statute is repugnant to the Federal Constitution (*Morehead v. New York*, 298 U. S. 587; *American Mfg. Co. v. St. Louis*, 250 U. S. 459; *Mackay Tel. & Cable Co. v. Little Rock*, 250 U. S. 94; *International Paper Co. v.*

*Massachusetts*, 246 U. S. 135; *Hendrickson v. Apperson*, 245 U. S. 105; *Pacific Livestock etc. v. Lewis*, 241 U. S. 440; *Price v. Illinois*, 238 U. S. 446; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651; *Atlantic Coastline Ry. Co. v. Georgia*, 234 U. S. 280).

Committee reports cannot be considered where the words of a statute are clear (*Helvering v. City Bank etc. Co.*, 296 U. S. 85, 89).

Lastly, the petition does not contain any allegation that section 990 was not enacted in aid of conservation. In the absence of such an allegation, the courts presume that the law was passed to conserve and foster the fish and game of the state (*Thomson v. Dana*, 52 Fed. 2d 759, aff. 285 U. S. 529).

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**SECTION 990 OF THE FISH AND GAME CODE IS NOT REPUGNANT TO STANDARDS ESTABLISHED BETWEEN THE UNITED STATES AND OTHER NATIONS.**

Petitioner indulges in lengthy argument to the effect that section 990 of the Fish and Game Code is void because it is contrary to certain pronouncements contained in articles of the United Nations Charter, in declarations set forth at Geneva in December of 1947 and in resolutions and articles adopted at conferences between nations of the Americas. All of those articles and resolutions appear to follow a common line. They declare that everyone is entitled to human rights and freedoms without distinction as to race, sex, language or religion. The petitioner has not called attention to anything which announced that California or any

other state of the United States may not conserve their fisheries by prohibiting fishing entirely or by limiting the privilege to its own citizens, to non-resident citizens or to any group of aliens.

The United States has asserted, as indicated in our previous brief (see pages 36-39), the right to protect the fisheries on the high seas adjacent to its coast. At a conference of coastal states held in Washington, D. C., in May of 1946 the State Department of the United States recognized the fact that the sovereign states are the ones who are entitled to and should establish such conservation zones on the high seas off their respective shores. This follows the theory that the title and ownership of the fisheries has always been in the sovereign states.

The *Tidelands* case (*United States v. California*, 332 U. S. 19) does not help the petitioner. As indicated in our previous brief (page 36 et seq.) it is significant that the assent of Congress to the compact between California, Oregon and Washington in relation to the fisheries was given *after* the *tidelands* decision. This manifests lack of Federal intent to assume any position in the coastal fisheries. Moreover, the *tidelands* decision distinguished but did not overrule such cases as *Manchester v. Massachusetts*, 139 U. S. 240, *The Abby Dodge*, 223 U. S. 166, or the *Skiriotes* case, *supra*.

Finally, the statute in question does not impose any burden on foreign or interstate commerce (*Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 426).



**CONCLUSION.**

For the foregoing reasons and those specified in our previous brief, it is urged that the decision below should be affirmed.

Dated, San Francisco, California,  
April 5, 1948.

Respectfully submitted,

**FRED N. HOWSER,**

Attorney General of the State of California,

**RALPH W. SCOTT,**

Deputy Attorney General of the State of California,

*Attorneys for Respondents.*





FILE COPY

JUL 23 1948

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1947

No. 533

**TORAO TAKAHASHI**, *Petitioner*,

v.

**FISH AND GAME COMMISSION, LEE F. PAYNE**, *as Chairman thereof*, **W. B. WILLIAMS, HARVEY E. HASTAIN**, and **WILLIAM SILVA**, *as members thereof*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS  
*AMICUS CURIAE*

**LEE PRESSMAN**,  
General Counsel,

**FRANK DONNER**,  
Assistant Counsel,  
*Congress of Industrial Organizations.*





IN THE  
**Supreme Court of the United States**

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**OCTOBER TERM, 1947**

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**No. 533**

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**TORAO TAKAHASHI, *Petitioner,***

**v.**

**FISH AND GAME COMMISSION, LEE F. PAYNE, as *Chairman thereof*, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as *members thereof*.**

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

---

**BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS  
*AMICUS CURIAE***

---

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE  
JUSTICES OF THE SUPREME COURT:**

This brief is filed, pursuant to the consent of all parties, in accordance with Rule-27 (9) of this Court.

**INTEREST OF THE CONGRESS OF INDUSTRIAL  
ORGANIZATIONS**

The issues raised by the instant case are of the most profound significance to *amicus curiae*. Article II of the Constitution of the Congress of Industrial Organizations states that the objects of the organization are:

"First. To bring about the effective organization of the working men and women of America *regardless of race, creed, color, or nationality*, and to unite them for common action into labor unions for their mutual aid and protection."

The Constitutions of its various constituent labor organizations likewise contain statements of fundamental policy against race discrimination and dedicate those organizations to the elimination of racial discrimination.

Since its formation in 1935, the Congress of Industrial Organizations has condemned the evil of racial discrimination and has actively instituted educational and legislative programs to end that evil. In 1942, by action of the Executive Board of the Congress of Industrial Organizations, a Committee on Racial Discrimination was established charged with the responsibility of preparing programs for the elimination of racial discrimination.

Subsequent to the formation of the CIO Committee on Racial Discrimination, the Congress of Industrial Organizations adopted a resolution in convention restating its opposition to all forms of racial discrimination.

"WHEREAS, Discrimination against workers because of race, religion or country of origin is an evil characteristic of our fascist enemies, we of the democracies are fighting fascism at home and abroad by welding all races, all religions and all peoples into a united body of warriors for democracy. Any discriminatory practices within our own ranks, against Negroes or other groups, directly aids the enemy by creating division, dissension and confusion. Any discriminatory practices in employment policies hampers production by depriving the nation of the use of available skills and manpower; therefore be it

"RESOLVED, That the CIO reiterates its firm opposition to any form of racial or religious discrimination and renews its pledge to carry on the fight for protection in law and in fact of the rights of every racial and religious group to participate fully in our social, political and industrial life."

*Amicus curiae* herein has a direct interest in the problem presented by this case. Many of its members are persons of Japanese birth who came to this country, as did so many millions of other immigrants, to seek the fulfillment of their

dreams of opportunity and equality. The statute in question presents a serious bar to the fulfillment of those dreams. Denied the right, through no fault or wrongdoing of their own, of becoming citizens, petitioner and other resident alien Japanese fishermen have been prevented from exercising the very basic right of earning a living in the field for which they are best qualified.

## ARGUMENT

### I.

SECTION 990 OF THE CALIFORNIA FISH AND GAME CODE DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAWS CONTRARY TO THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A mere glance at the legislative history of the statute should be enough to convince this Court, as it did the trial court (R. 17) that the statute was aimed exclusively against aliens of Japanese ancestry.

Prior to 1942 the persons who could obtain commercial fishing licenses in California were described in the section as follows:

"A commercial fishing license may be issued only to a person who has continuously resided within the United States for a period of one year immediately prior to the time he makes application for such license. A commercial fishing license may be issued to a corporation only if said corporation is au-

"Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state, shall procure a commercial fishing license.

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license may be issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship." (Enacted 1933; amended by later Act passed at same session, Stat. 1933, ch. 696, p. 1784; amended by Stat. 1943, ch. 1100, §3, p. 3040; amended by Stat. 1945, ch. 181, §3.)



thorized to do business in this State." (Enacted by Stats. 1933, p. 479; Amended by later act passed at same session, Stats. 1933, p. 1784.)

In 1942 the Japanese, including petitioner, were evacuated from California. (R. 11.)

In 1943, Section 990 of the Fish and Game Code was amended by Cal. Stats. 1943, ch. 1100, § 3, p. 3040, to read as follows:

"A commercial fishing license may be issued to any person other than an alien Japanese. A commercial fishing license may be issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are alien Japanese, and if less than the majority of each class of stockholders thereof are alien Japanese."

Thus prior to the evacuation, *any* person, so long as he had resided in the United States for one year immediately prior to making application, and *any* corporation authorized to do business in California was eligible to secure a license. Thus, petitioner had fished for his livelihood and had been granted licenses so to do since 1915 (R. 11). Following abruptly on the heels of the evacuation, the section was changed so that all persons *except* alien Japanese, regardless of how long they had resided in the United States, were eligible to secure licenses. And further, all corporations authorized to do business in the state, *except* those who had no alien Japanese officers or directors or those 50 percent or more of whose stock was owned by alien Japanese, were eligible to secure licenses. All this, regardless of how long such alien Japanese had lived in this country or how loyal they were to its principles.

Clearly the statute as amended in 1943 was unconstitutional. *Yick Wo v. Hopkins*, 118 U. S. 356.

Recognizing this infirmity, an official committee of the California Senate appointed by Senate Resolution No. 122, Session of 1943, "to investigate the questions of Japanese readjustment involving the relocation of Japanese internees and evacuees" reported to the Senate as follows:

"The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship.

"The committee has introduced Senate Bill 413 to make this change in the statute."

Senate Bill 413 later became law by Stats. 1945, ch. 181, § 3, so that the section reads as it does today.

It is thus crystal clear that the only purpose of the 1945 amendment was to eliminate the question of the unconstitutionality of the previous wording. The Senate Fact-Finding Committee was to deal with problems relative to the *Japanese*. It had no concern with, nor did it concern itself with, problems of fishing nor of any other aliens ineligible to citizenship. Its investigation was directed at the Japanese and its recommendations and the bill it introduced were directed at the Japanese.

In the light of the above history, the substitution of the term, "person ineligible to citizenship" for "alien Japanese" is not the kind of "legal litmus paper" that can blind this Court to the true racist purpose of the statute. *Yu Cong Eng v. Trinidad*, 271 U. S. 500.

Respectfully submitted,

**LEE PRESSMAN,**  
General Counsel,

**FRANK DONNER,**  
Assistant Counsel,  
*Congress of Industrial Organizations.*

<sup>1</sup> Pg. 5, Report of the Senate Fact-Finding Committee on Japanese Resettlement, Calif. State Printing Office, 1945. This report has previously been lodged with the Clerk of this Court in *Oyama v. California*, No. 44, October Term 1947.

<sup>2</sup> Justice Holmes in *Abrams v. United States*, 250 U. S. 616, 629.



# **In the Supreme Court of the United States**

OCTOBER TERM, 1947

---

No. 533

TORAO TAKAHASHI, PETITIONER

v.

FISH AND GAME COMMISSION, LEE F. PAYNE, AS  
CHAIRMAN THEREOF, W. B. WILLIAMS, HARVEY  
E. HASTAIN, AND WILLIAM SILVA, AS MEMBERS  
THEREOF

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF CALIFORNIA

---

## **MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI**

The United States respectfully urges the Court to grant the petition for certiorari which has been filed in this case.

The petition presents substantial constitutional issues of national importance, affecting the fundamental civil rights of a large number of persons. The specific questions involved relate to the constitutionality of Section 990 of the Fish and Game Code of California, as amended in 1945 to provide that commercial fishing licenses may be



issued only to persons other than those "ineligible to citizenship". In *Truax v. Raich*, 239 U. S. 33, 41, it was held that the Constitution forbids a State "to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood". The Court emphasized that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure". *Ibid.* If the petition for certiorari should be granted in the present case, the Government will contend, as *amicus curiae*, that the challenged provision of the Fish and Game Code of California cannot be reconciled with the principles applied by this Court in *Truax v. Raich*, *supra*, and other cases. Cf. *Yick Wo v. Hopkins*, 118 U. S. 356; *Oyama v. California*, No. 44, October Term, 1947, decided January 19, 1948.

For these reasons, the Government respectfully submits that the petition for certiorari presents questions warranting review by this Court, and should be granted.

✓ TOM C. CLARK,  
Attorney General.

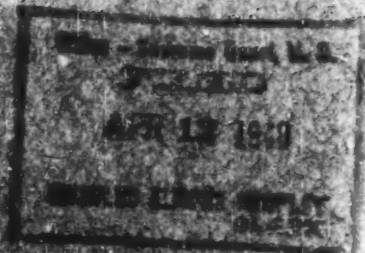
✓ PHILIP B. PERLMAN,  
Solicitor General.

FEBRUARY 1948.





FILE COPY



No. 233

**In the Supreme Court of the United States**

**October Term, 1942**

**TOHAT TAKAHASHI, PETITIONER,**

**FISH AND GAME COMMISSION, LEE R. FAYNE, AS  
CHIEFMAN, RESPONDENTS.**

**ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF  
THE STATE OF CALIFORNIA.**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**





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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1947**

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**No. 533**

**TORAO TAKAHASHI, PETITIONER**

**v.**

**FISH AND GAME COMMISSION, LEE F. PAYNE, AS  
CHAIRMAN THEREOF, ET AL.**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF CALIFORNIA**

---

## **BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This case involves the constitutionality of Section 990 of the Fish and Game Code of California, as amended in 1945 (Cal. Stats. 1945, ch. 181) to provide that commercial fishing licenses may be issued only to persons other than those "ineligible to citizenship." The Government is submitting this brief because the constitutional questions presented have substantial national importance, affecting the civil rights of many persons and groups residing within the United States. In our view, Section 990, in so far as it prohibits licensing of persons ineligible to citizenship, is invalid on three separate grounds:

(1)



1. It denies petitioner the equal protection of the laws, in violation of the Fourteenth Amendment.

2. It constitutes an unwarranted limitation upon petitioner's privilege—derived from federal law—to enter and remain within the United States and any State.

3. It is in conflict with provisions of the Civil Rights Act of 1870.

## I

In adopting eligibility for citizenship as a standard governing issuance of commercial fishing licenses, California has incorporated in its laws a classification based primarily on race and color. The nationality law enacted by the first Congress on March 26, 1790, restricted eligibility for citizenship to "free white persons." 1 Stat. 103. This provision was not enlarged until after the Civil War, when the Act of July 14, 1870, extended eligibility "to aliens of African nativity and to persons of African descent." 16 Stat. 254, 256. A third racial group, descendants of races indigenous to the Western Hemisphere, was added by the Nationality Act of 1940. 54 Stat. 1137, 1140. In 1943, "Chinese persons or persons of Chinese descent" were included as a fourth eligible racial group. 57 Stat. 600, 601. And, in 1946, Filipinos and persons of races indigenous to India were made eligible. 60 Stat. 416. These statutory provisions have been codified in Section 703 of Title 8 of the United States Code.

The wisdom or constitutionality of these enactments need not concern us here. It is important only to recognize that Congress, in defining the groups eligible for citizenship, has drawn lines based on race and color. This Court, in construing the naturalization laws, has noted that Congress has employed a "racial and not an individual test." *Ozawa v. United States*, 260 U. S. 178, 197. In *Toyota v. United States*, 268 U. S. 402, 412, the Court observed that "it has long been the national policy [as to naturalization] to maintain the distinction of color and race." See also *United States v. Thind*, 261 U. S. 204. The point need not be labored, for in *Oyama v. California*, 332 U. S. 633, decided at this Term, the Court held that an identical classification appearing in California's Alien Land Law involved a racial discrimination.

The parties and the state courts in this case have been much occupied with the question whether the challenged provision in Section 990 is "anti-Japanese."<sup>1</sup> Quite apart from its merits,

<sup>1</sup> In 1943 Section 990 was amended to read: "A commercial fishing license may be issued to any person other than an alien Japanese." (Cal. Stats. 1943, ch. 1100.) At the 1943 session of the California legislature, the Senate appointed a fact-finding committee on the subject of Japanese resettlement, which filed its Report on May 1, 1945 (R. 17). (A copy of this Report has been lodged with the Clerk of this Court.) With respect to fishing by Japanese, the Committee reported as follows (pp. 5-6):

The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and

the controversy on this question seems entirely unnecessary to the decision of this case. The Supreme Court of California, in sustaining the validity of Section 990, considered it important that when the 1945 amendment to the section was passed, the federal naturalization laws prohibited not only Japanese but also Hindus and Malaysians from becoming citizens of the United States (R. 40-42). We have difficulty, however, in perceiving how this can meet the fundamental constitutional objections to the provision. The racial barrier erected by the statute is no less unconstitutional because it shuts out not merely Japanese but other so-called Asiatic races as well. The difficulty with Section 990, as amended in 1945, is not so much that it applies, or was intended to apply, principally against Japanese, but rather that it draws a line which, in substance and effect, is based on race and color. A measure which is bad because it unjustifiably discriminates against one racial group is not made better because it also

operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is a danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute.

Senate Bill 413 was passed, thus resulting in Section 990 in its present form (R. 17).

discriminates against other such groups. If petitioner were a Malayan, his attack on the constitutionality of Section 990 would surely have no less merit.

Clearly, then, Section 990 draws a line based on race and color. We do not contend, of course, that the presence of such an element of discrimination in a state statute terminates inquiry into its validity. It does, however, impose an obligation upon the State to show justification sufficient to overcome the *prima facie* invalidity of a racial discrimination.

It is hardly necessary to review the controlling principles of adjudication in this field. This Court proceeds on the premise that "our Constitution is color-blind."<sup>2</sup> Distinctions based on race or color alone cannot ordinarily withstand constitutional scrutiny.<sup>3</sup> The Court's approach to racial discriminations was described in *Korematsu v. United States*, 323 U. S. 214, 216, as follows:

all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It

<sup>2</sup> This descriptive phrase is no less accurate because it is taken from a dissenting opinion. See Mr. Justice Harlan in *Plessy v. Ferguson*, 163 U. S. 537, 559.

<sup>3</sup> See, e. g., *Buchanan v. Warley*, 245 U. S. 60; *Fick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; *Hill v. Texas*, 316 U. S. 400; *Strauder v. West Virginia*, 100 U. S. 303.



is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Mindful that the Fourteenth Amendment was principally intended "to prevent state legislation designed to perpetuate discrimination on the basis of race or color" (*Railway Mail Association v. Corsi*, 326 U. S. 88, 94), the Court will make the most searching inquiry into the sufficiency of any grounds asserted as justification for invasion of fundamental civil rights. See *Murdock v. Pennsylvania*, 319 U. S. 105, 115; *Follett v. McCormick*, 321 U. S. 573, 577; *Marsh v. Alabama*, 326 U. S. 501, 509; *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153, n. 4.

That Section 990 involves a racial discrimination with respect to a basic constitutional right can hardly be doubted. Because he is a Japanese, petitioner Takahashi has been denied the right to earn a livelihood by pursuing his accustomed calling. Petitioner is not an amateur who fishes for sport or pleasure. Fishing on the high seas has been his occupation since 1915. And it is the right to earn a living in this way—perhaps the only way he knows—that petitioner complains has been denied him by Section 990. It is settled that the Constitution prohibits discriminations against persons, on the grounds of race or ancestry, which

prevent them from engaging in a business or occupation. See *Yick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; *Yu Cong Eng v. Trinidad*, 271 U. S. 500; cf. *Kotch v. Pilot Commissioners*, 330 U. S. 552. In *Truax v. Raich*, *supra*, at 41, the Court held that a State's police power

does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

And in the *Kotch* case, *supra*, at 556, the Court said:

An example [of denial of equal protection of the laws] would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities.

Mr. Justice Rutledge, writing in dissent for himself and Justices Reed, Douglas, and Murphy, stated:

Classification based on the purpose to be accomplished may be said abstractly to be sound. But when the test adopted and applied in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment. That is not a test; it is a wholly arbitrary exercise of power.

(330 U. S. at 565-566.)

We come, next, to the question whether the racial discrimination embodied in Section 990 can be justified—or, to put it in a slightly different way, whether there is any rational and constitutionally supportable basis for making denial of commercial fishing licenses hinge upon the applicants' eligibility or ineligibility for citizenship. The line drawn by Section 990, it must be emphasized, is not between aliens and citizens. In support of the reasonableness of distinguishing between citizens and aliens generally, it has sometimes been suggested that aliens as a class are less familiar with the laws and customs of this country than are citizens, and that their status as aliens may be regarded as signifying a lesser degree of attachment to our principles and institutions. See *Clarke v. Deckebach*, 274 U. S. 392, 394. Whatever may be said as to the persuasiveness of these

arguments in other contexts, they are wholly irrelevant here. The line here is not between aliens and citizens but between two types of aliens, depending upon their eligibility for citizenship. And there is wholly lacking any indication that eligibility for citizenship, as prescribed by federal law, bears any rational relation to conservation, or to the police power, or to any other interest which a State may properly protect in establishing standards governing issuance of fishing licenses.

The 1945 amendment to Section 990 can hardly be justified as a conservation measure. Nothing in its provisions or in its legislative background and history has been cited to support such a claim. It limits neither the number of licenses nor the amount of fish which licensees can take. Both the 1945 amendment and its 1943 precursor were enacted in a period during the war when both federal and State authorities were doing everything possible to enlarge food production to meet ever-increasing needs. It is unnecessary to repeat here the impressive evidence assembled by petitioner to refute the assertion that the discrimination

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\* For this reason, cases like *Heim v. McCall*, 239 U. S. 175, and *Crane v. New York*, 239 U. S. 195 (statute distinguishing between aliens and citizens for employment on public works), *Patson v. Pennsylvania*, 222 U. S. 139 (statute prohibiting aliens from killing wild game), and *McCready v. Virginia*, 94 U. S. 391 (statute prohibiting non-residents of state from planting oysters in its territorial waters), are not controlling here.



made by Section 990 was intended as a conservation measure. (Brief, pp. 24-32.) But even if it be assumed that conservation was the purpose of the statute, no rational connection has been shown to exist between the effectuation of such a purpose and the exclusion of certain groups, identifiable solely on the basis of race or color. This Court has said of the Fifteenth Amendment that it "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U. S. 268, 275. No sophistication is necessary to perceive the discrimination here.

It is argued, however, that California, in adopting "eligibility to citizenship" as a classification, has merely followed the lead of Congress, and that if it is proper for Congress to draw such a line for naturalization purposes, it is surely not improper for a State to adopt the same line for its purposes. We are not here concerned with the extent to which the power of Congress over immigration and naturalization is subject to constitutional limitations. Assuming that power to be "plenary" and not subject to requirements of equal protection of the laws, it does not necessarily follow that a classification which can be upheld as an exercise of such power by Congress is valid when adopted by a State in exercising another and wholly different power. The classification adopted by the State must be judged on its own merits by constitutional standards appropriate in determining the validity of State enact-

ments. It could hardly be contended that the ordinance invalidated by this Court in *Buchanan v. Warley*, 245 U. S. 60, for example, would have been less unconstitutional if it had involved a discrimination based not expressly upon race but upon "eligibility to citizenship."

Nor can the discrimination involved in Section 990 be justified by any peculiar relationship of the State to wild fish and game. The opinion of the Supreme Court of California asserts that "the state is the owner of the fish in coastal waters and may regulate the taking of them for private use." (R. 36.) The argument implicit in this assertion seems to be that, in dealing with fish and game, the State is in effect unrestrained by any constitutional limitations. In our view, however, the constitutionality of Section 990 is not enhanced by the circumstance that the subject-matter of the regulation is fishing. We think the statute stands on precisely the same constitutional footing as if it involved a license to engage in the laundry business or any other occupation or activity which California has a right to regulate in the public interest.

It should be noted, moreover, that petitioner explicitly disavows any claim "to take fish in which the State of California has or can rightly claim a proprietary interest" (Br. p. 10). But even if petitioner had asserted a right to fish, not on the high seas outside the territorial jurisdiction of California, but in waters within such

jurisdiction, we submit that Section 990 would be equally invalid if it were applied to deny him such right.\* The respondent's argument relies on expressions in a number of opinions, beginning with *Geer v. Connecticut*, 161 U. S. 519, in which this Court has spoken of a State as in some sense the owner of animals *ferae naturae* found within its borders. See *Silz v. Hesterberg*, 211 U. S. 31; *Patson v. Pennsylvania*, 232 U. S. 138; *Lacoste v. Department of Conservation*, 263 U. S. 545; *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1; *Bayside Fish Co. v. Gentry*, 297 U. S. 422. The fictional basis of any characterization of the State as having a "proprietary interest" was demonstrated by Mr. Justice Holmes in *Missouri v. Holland*, 252 U. S. 416, 434:

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not

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\* The power of a State to regulate fishing in navigable waters is based upon its governmental authority, and not upon its ownership of the fish; and even this power is qualified and depends upon the absence of any conflict with federal regulations. See *Skiriotes v. Florida*, 313 U. S. 69, 75, and cases cited.

in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.

A State's unquestionably valid interest in conservation has been held to support, as against attack on due process grounds, general regulations designed to eliminate certain methods of processing fish after their capture. *Bayside Fish Company v. Gentry*, 297 U. S. 422. Similarly, the same interest has been held under the Commerce Clause to justify various general limitations on the capture, possession, and transportation out of the State of wild game. *Geer v. Connecticut*, 161 U. S. 519; *Silz v. Hesterberg*, 211 U. S. 31; *Patterson v. Pennsylvania*, 232 U. S. 138; *Bayside Fish Company v. Gentry*, *supra*. In each case, however, the decision was based, not on any notion that the State in dealing with fish and game was beyond constitutional restriction, but rather on an evaluation of the legitimate interest of the State in conservation, as a factor affording rational justification for the regulation. In other cases this Court has shown no reluctance in rejecting an asserted claim of State authority where it was found either to conflict with a paramount federal right or to infringe constitutional prohibitions. Thus, in *Missouri v. Holland*, *supra*, the State's as-



sertion of exclusive control over wild game did not prevail against paramount federal authority under the treaty-making power. And in *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, the Court struck down, as "a prohibited interference with interstate commerce, restrictions on the extra-State transportation of shrimp."

To describe a State's interest as "proprietary" rather than "governmental," or to characterize the right to fish as a "privilege," cannot serve to relieve a State from the duty imposed by the Fourteenth Amendment to refrain from unjustifiable racial discriminations. In other contexts, this Court has declared that a State may not exercise even its rights of proprietorship so as to infringe the civil rights of those subject to its jurisdiction. Thus, in *Hague v. Congress for Industrial Organization*, 307 U. S. 496, 516, it was stated (opinion of Roberts, J.) that the undoubted powers of a municipality over the use of parks, streets, and public buildings owned by it could not "be made the instrument of arbitrary

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\* See, also, *McCready v. Virginia*, 94 U. S. 391; and *Patson v. Pennsylvania*, 232 U. S. 138. The latter case upheld a Pennsylvania statute which prohibited any alien to kill wild game. The case apparently involved hunting for sport rather than as a means of livelihood. The Court, on the record before it, regarded the statute as genuinely aimed at the conservation of wild game, stating that "this court has no such knowledge of local conditions as to be able to say that it [the state legislature] was manifestly wrong" in concluding that "resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent." (232 U. S. at 144-145.)

suppression of free expression of views on national affairs." See also *Jamison v. Texas*, 318 U. S. 413; *Marsh v. Alabama*, 326 U. S. 501; *Tucker v. Texas*, 326 U. S. 517; cf. *Kotch v. Pilot Commissioners*, 330 U. S. 552.

## II

Quite apart from its inability to measure up to the requirements of the equal protection clause of the Fourteenth Amendment, Section 990, as amended in 1945, constitutes an invalid incursion in the field of immigration and naturalization—in which federal regulatory authority is, of course, supreme. *Hines v. Davidowitz*, 312 U. S. 52; *Fong Yue Ting v. United States*, 149 U. S. 698; *Henderson v. Mayor of City of New York*, 92 U. S. 259; *Holmes v. Jennison*, 14 Pet. 540, 570. This Court stated in *Hines v. Davidowitz*, *supra*, at 65-66:

Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens \* \* \* bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one. \* \* \* And specialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty "To establish an Uniform Rule of Naturalization \* \* \*."

Cf. *United States v. Belmont*, 301 U. S. 324, 331; *United States v. Pink*, 315 U. S. 203, 222-223.

In the exercise of its constitutional powers, Congress has enacted, in Title 8 of the United States Code, a comprehensive and integrated system of immigration and naturalization laws. These provisions define with particularity the terms and conditions on which aliens are permitted to enter and remain within this country. Congress has prescribed who may enter the country and under what conditions (Sections 100-246), who shall be deported and for what causes (Sections 154-157), and who shall be entitled to apply for citizenship and under what terms (Section 501 *et seq.*). Title 8 further provides specific protection of the civil rights of aliens while residing within our borders (Section 41; see Point III, *infra*, pp. 21-23).

We do not here contend that Section 990 is invalid merely because it is a State regulation affecting aliens. As stated in *Hines v. Davidowitz*, *supra*, p. 67, there is no "infallible constitutional test" or "exclusive constitutional yardstick" for determining the validity of a State regulation within a field in which the power of Congress is supreme. The primary function of this Court is to decide whether, upon evaluation of all the relevant factors, the State regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ibid.* In considering such an issue, the Court will be mindful that

it is of importance that this legislation is in a field which affects international rela-

tions, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.

*Hines v. Davidowitz, supra*, at p. 68.

In Point I, *supra*, we have argued that Section 990 denies petitioner the equal protection of the laws, and in support of that contention have cited *Truax v. Raich*, 239 U. S. 33. But that case goes even further. In its opinion, the Court stated (p. 42):

The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country



under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

Petitioner was admitted to the United States lawfully, pursuant to authority granted by Congress. He thereby obtained "the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union." *Truax v. Raich*, *supra*, at 39. Congress has not limited the right of immigration solely to those who are eligible for citizenship. As a peaceful, law-abiding resident alien, petitioner is entitled to the full and equal protection of the laws, which is "a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S. 356, 369.

The protection which the Constitution affords to civil rights extends to all persons within the country, without distinction as to their nationality. *Fong Yue Ting v. United States*, 149 U. S. 698, 724; *Home Insurance Company v. Dick*, 281 U. S. 397, 411; *Yick Wo v. Hopkins*, *supra*; *Bridges v. California*, 314 U. S. 252; *Colyer v. Skeffington*, 265 Fed. 17, 24 (D. Mass.). And, in securing the rights of resident aliens, Congress has taken affirmative action by translating these general con-

\* The relevant statutory provisions are collected in Reitzel, *The Immigration Laws of the United States—An Outline*, 32 Va. L. Rev. 1099, 1106-1112.

stitutional safeguards into specific statutory commands. R. S. 1977; 8 U. S. C. sec. 41. Cf. *Fay v. New York*, 332 U. S. 261; 282-283.

By imposing an unjustifiable limitation on petitioner's capacity to earn a livelihood, California has placed a substantial restriction on the exercise of his right—derived from Congress—to enter and abide in the United States and any State. The probable effect of Section 990 is to deter alien Japanese fishermen from entering and remaining in the State, and this, as petitioner argues, may well have been its principal purpose. See the concurring opinions of Mr. Justice Black and Mr. Justice Murphy in *Oyama v. California*, 332 U. S. 633 at 649, 657; cf. *Estate of Yano*, 188 Cal. 645, 658. Such a restraint on the exercise of a right conferred by federal law is no less invalid because

it is not an absolute prohibition. State taxes and other exactions upon the landing of immigrants have been held invalid even though they fell far short of excluding aliens entirely. *Henderson v. Mayor of City of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *People v. Compagnie Generale Transatlantique*, 107 U. S. 59. In invalidating a California statute imposing fees upon immigrants arriving from foreign ports, this Court said, (*Chy Lung v. Freeman*, *supra*, at 286):

The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to

regulate commerce with foreign nations; the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.

The invalidity of Section 990 as an intrusion upon national authority is further emphasized by the fact that its prohibition against issuance of commercial fishing licenses is directed only against aliens who are ineligible for citizenship. That such aliens cannot, under present federal laws, qualify for citizenship affects in no way either the legality of their entry into the United States or their right to remain within this country and to enjoy the equal protection of its laws. In precluding such aliens from citizenship, Congress has placed no stigma upon them and has passed no judgment as to their morals or good character. Congress has merely, for reasons which it deemed sufficient and proper, denied to such persons the privilege of becoming American citizens. By barring these aliens from one of the common occupations, California has burdened them with a substantial civil disability, solely because of their status under the federal naturalization laws. There is no reason to believe that Congress intended that such consequences should flow from its action in denying some aliens the privilege of citizenship.

## III

A third ground for invalidation of Section 990 is that it is in conflict with Section 16 of the Civil Rights Act of 1870 (16 Stat. 140; 144), now appearing as Section 1977 of the Revised Statutes (8 U. S. C. Sec. 41). This section provides as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

There can be no doubt that the protection of this statute extends to aliens as well as to citizens. *Yick Wo v. Hopkins*, 118 U. S. 356, 369; *United States v. Wong Kim Ark*, 169 U. S. 649, 696. The provisions of R. S. 1977 find their origin in Section 1 of the Civil Rights Act of April 9, 1866 (c. 31, 14 Stat. 27), which provided for the protection of civil rights of Negroes. Four years later, Congress enacted Section 16 of the Civil Rights Act of 1870, which extended similar protection to all persons within the jurisdiction of the United States. The legislative history of the Civil Rights Act of 1870 shows that it was intended to



confer upon aliens the same civil rights which had already been guaranteed to Negroes. Congressional Globe, 41st Cong., 2d Sess., pp. 1536, 3658; Flack, *Adoption of the Fourteenth Amendment*, pp. 219, 221.

The constitutional validity of R. S. 1977, as applied to aliens, does not rest solely upon the power of Congress to enforce the Fourteenth Amendment. This Court has indicated several sources of the power of Congress to control the admission and residence of aliens. *Turner v. Williams*, 194 U. S. 279, 290; *Hines v. Davidowitz*, 312 U. S. 52, 62-66. It may be founded on the power to regulate foreign commerce (cf. *Head Money Cases*, 112 U. S. 580, 591; *Henderson v. Mayor of City of New York*, 92 U. S. 259, 270-274), or on the power to conduct the foreign relations of the United States (cf. *Chy Lung v. Freeman*, 92 U. S. 275, 279-280; *Fong Yue Ting v. United States*, 149 U. S. 698, 711, 712), or it may arise as an incident of the sovereignty of the United States (cf. *Chae Chan Ping v. United States*, 130 U. S. 581, 602-609; *Fong Yue Ting v. United States*, 149 U. S. 698, 705, 711; *Wong Wing v. United States*, 163 U. S. 228, 231; *Tiaco v. Forbes*, 228 U. S. 549, 556-557; *Mahler v. Eby*, 264 U. S. 32, 39).

Whatever its basis, there can be no doubt as to the supreme power of Congress to "prescribe the terms and conditions upon which aliens may enter or remain in the United States." *United States*

*Ex rel. Volpe v. Smith*, 289 U. S. 422, 425: The Civil Rights Act of 1870 constitutes a legitimate exercise of that power. It commands that aliens shall have "the same right in every State and Territory \* \* \* to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Italics added.)

Congress has thus forbidden any State to impose unwarranted discriminations upon resident aliens, simply because they are aliens. We do not argue that aliens and citizens must be treated identically for every purpose. We do argue that if a distinction is drawn, it must be justified by considerations of "pressing public necessity" (cf. *Korematsu v. United States*, 323 U. S. 214, 216) upon which the State bases its action. It may well be that legitimate State interests, such as conservation of its resources or maintenance of the peace, may in some situations justify different treatment of aliens. It is clear that "racial antagonism never can." *Korematsu v. United States*, *supra*.

#### CONCLUSION

It is respectfully submitted that Section 990 of the Fish and Game Code of California, in so far as it prohibits issuance of licenses to persons ineligible to citizenship, is unconstitutional, and

that the judgment of the Supreme Court of California should be reversed.

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APRIL 1948.







FILE COPY

No. 533

U.S. Supreme Court  
FILED  
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IN THE  
**Supreme Court of the United States**  
October Term, 1947

TORAO TAKAHASHI,

*Petitioner,*

*v.*

FISH AND GAME COMMISSION, LEE F. PAYNE, as  
Chairman thereof, W. B. WILLIAMS, HARVEY E.  
HASTAIN, and WILLIAM SILVA, as members thereof.

**MOTION AND BRIEF FOR THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT OF  
COLORED PEOPLE AS AMICUS CURIAE.**

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✓ MARIAN WYNN PERRY,

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Association for the Advance-  
ment of Colored People.*

EDWARD R. DUDLEY,  
*Of Counsel.*



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WILLIAMS, HARVEY E. HASTAIN, and  
WILLIAM SILVA, as members thereof.

**MOTION AND BRIEF FOR THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT OF  
COLORED PEOPLE AS AMICUS CURIAE.**

*To the Honorable, the Chief Justice and the Associate Jus-  
tices of the Supreme Court:*

The undersigned, as Counsel for the National Association for the Advancement of Colored People, respectfully move this Court for leave to file the accompanying brief as *Amicus Curiae* in the above entitled appeal.

The National Association for the Advancement of Colored People is a membership organization which for thirty-eight years has dedicated itself to and worked for the achievement of functioning democracy and equal justice under the Constitution and laws of the United States.

From time to time some justiciable issue is presented to this Court, upon the decision of which depends the evolution of institutions in some vital area of our national life. Such an issue is before the Court now.

The issue at stake in the above entitled petition for certiorari is the power of a state to discriminate among persons within its jurisdiction in their exercise of the right to earn a living in a common occupation. The determination of this issue involves an interpretation of the Fourteenth Amendment which will have widespread effect upon the welfare of all minority groups in the United States.

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 Association for the Advance-  
 ment of Colored People.*

EDWARD R. DUDLEY,  
*Of Counsel.*

IN THE  
**Supreme Court of the United States**  
October Term, 1947

TORAO TAKAHASHI,  
*Petitioner,*

FISH AND GAME COMMISSION, LEE F.  
PAYNE, as Chairman thereof, W. B.  
WILLIAMS, HARVEY E. HASTAIN, and  
WILLIAM SILVA, as members thereof.

**BRIEF FOR THE NATIONAL ASSOCIATION  
FOR THE ADVANCEMENT OF COLORED  
PEOPLE AS AMICUS CURIAE**

**Opinion Below and Statute Involved**

The opinion below and the statute involved are set forth in full in the record and in the petition for a writ of certiorari to this Court and are adopted herein as the statement of jurisdiction contained in that petition.



## Questions Presented

### I

***Whether consistent with the Fourteenth Amendment the State of California may deny to a single class of alien residents of California the right to earn their living by commercial fishing.***

### II

***Whether consistent with the treaty obligations of the United States the State of California may deny to a single class of alien residents of California the right to earn their living by commercial fishing.***

## Statement of the Case

The petitioner herein has been a resident of Los Angeles, California, continuously since 1907 with the exception of that period of time when he was excluded from California under the Military Exclusion Laws during World War II. From 1915 until his exclusion from the state by act of the Federal Government petitioner earned his living by commercial fishing on the high seas, which activity was carried on pursuant to a license from the Fish and Game Commission of the State of California (R. 1-6). In 1945, the State of California amended Section 990 of the Fish and Game Code (Stats. 1945, Ch. 181) so as to forbid the issuance of a commercial fishing license to a person ineligible to citizenship, or to corporations a majority of whose stockholders or any of whose officers were ineligible to citizenship. Upon the face of the statute no other criterion is applied for licensing. Upon petitioner's return to California in October, 1945 at the termination of the Military Exclusion Orders he found himself, after thirty years of employment as a commercial fisherman, completely barred from that field of employment.

The petition for certiorari in this Court is to review the judgment of the Supreme Court of California which reversed the holding of the Superior Court which had found that the Fish and Game Law, as amended, constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

## REASONS FOR GRANTING THE WRIT

### I

The question presented by the petition is one of national importance and involves a fundamental question of constitutional law.

### II

A statute denying to a racial group the right to engage in a common occupation violates the equal protection clause of the Fourteenth Amendment.

### III

A state law denying to a racial group the right to engage in a common occupation violates obligations of the Federal Government under the United Nations Charter.

## ARGUMENT

### I

The question presented by the petition is one of national importance and involves a fundamental question of constitutional law.

The legislation here presented for review was enacted at a time of strong anti-Japanese hysteria on the west coast

which revived the campaign of more than thirty years before to keep the Japanese out of California. This legislation like the Alien Land Law of California which was before this Court in *Oyama v. California*<sup>1</sup> was "designed to effectuate a purely racial discrimination," . . . "is rooted deeply in racial, economic and social antagonisms", . . . and "racial hatred and intolerance."<sup>2</sup> Like that law it is framed "to discourage the coming of Japanese into this state."<sup>3</sup>

This Court recognized in *Truax v. Raich* that:

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality."<sup>4</sup>

The end sought by this legislation reverts to the fundamental proposition upon which our country is founded, namely whether the states may by individual action divorce themselves from the common problems of the nation. The federal government has the exclusive right to determine whether Japanese aliens may enter this country, but the position of California asserts the right of state by individual action to nullify the act of the Federal Government and effectively exclude aliens from its territory. That such a

<sup>1</sup> 16 L. W. 4108. — U. S. — (decided January 19, 1948).

<sup>2</sup> *Ibid.*, concurring opinion of Mr. Justice MURPHY.

<sup>3</sup> *Estate of Tetsubumi Yano*, 188 Cal. 645.

<sup>4</sup> 239 U. S. 33, 42.

concept must be rejected is apparent from the words of Mr. Justice CARDOZO in *Baldwin v. G. A. F. Seelig, Inc.*:

"The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."<sup>5</sup>

This language was adopted by this Court in 1941 in upholding the right of *citizens* freely to move from state to state.<sup>6</sup> The unity of our country's destiny, asserted in 1915 to stem an hysteria against "the yellow hordes" and in the days of economic depression to protect the poor and unemployed, must be reasserted today by this Court if we are to move forward towards a peaceful and democratic society in a truly "United" States.

## II

**A statute denying to a racial group the right to engage in a common occupation violates the equal protection clause of the Fourteenth Amendment.**

While the statute on its face purports to have a certain impartiality by describing the proscribed group as "persons ineligible to citizenship", the 1940 Census Report<sup>7</sup> shows that of 47,305 aliens ineligible to citizenship in the country, only 1,000 were other than Japanese. Of these, 33,569 were Japanese aliens residing in California.

Having so recently reviewed the legislative history of the California Alien Land Law in the *Oyama* case, this

<sup>5</sup> 294 U. S. 511, 523.

<sup>6</sup> *Edwards v. California*, 314 U. S. 160.

<sup>7</sup> U. S. Census, 1940, *Characteristics of the Non-White Population*, p. 2.



Court cannot fail to recognize the same purpose and the same undemocratic motivation in the enactment of a law barring Japanese from a common occupation in the State of California. It remains only to be considered whether there is any reasonable basis which can be legally justified under the Fourteenth Amendment, for the classification of Japanese as a group ineligible to engage in commercial fishing.

"Such a rational basis is completely lacking where, as here, the discrimination stems directly from racial hatred and intolerance. The Constitution of the United States, as I read it, embodies the highest political ideals of which man is capable. It insists that our government, whether state or federal, shall respect and observe the dignity of each individual whatever may be the name of his race, the color of his skin or the nature of his beliefs. It thus renders irrational, as a justification for discrimination, those factors which reflect racial animosity."<sup>8</sup>

As stated by this Court, through Mr. Justice HOLMES, in *Nixon v. Herndon*:<sup>9</sup> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is . . . clear . . . that color cannot be made the basis of statutory classification." The cold statistics of the number of ineligible aliens affected by this statute<sup>10</sup> sweep away any contention that its basis is not the "yellow color" of the Japanese. It is of such color legislation that this Court stated in *Hirabayashi v. United States*:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a

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<sup>8</sup> Concurring opinion of Mr. Justice MURPHY, in *Oyama v. California*, *supra*.

<sup>9</sup> 273 U. S. 536, 541.

<sup>10</sup> See footnote 1, *supra*.

free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."<sup>11</sup>

"No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong and which in the eye of the law is not justified. The discrimination is therefore illegal. . . ."<sup>12</sup>

This Court has long recognized that the Fourteenth Amendment guarantees the right of persons within the jurisdiction of a state not only "to be free from the mere physical restraint of his person" but also "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."<sup>13</sup> Even the action of private associations sanctioned indirectly by the state or federal government, in excluding persons from employment because of race have been held prohibited by constitutional limitation.<sup>14</sup>

The legislation of the State of California seeking to prevent Japanese from engaging in a common occupation has no rational basis. Being based solely on race, it comes into fatal conflict with the Fourteenth Amendment.

<sup>11</sup> 320 U. S. 81, 100.

<sup>12</sup> *Yick Wo v. Hopkins*, 118 U. S. 356, 374.

<sup>13</sup> *Allgeyer v. State of Louisiana*, 165 U. S. 589.

<sup>14</sup> *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192.

## III

**A state law denying a racial group the right to engage in a common occupation violates obligations of the Federal Government under the United Nations Charter.**

As set forth above in Point I, the United States Government has sole jurisdiction to admit aliens into the United States. Once such aliens are admitted they become entitled to those constitutional protections which under our form of government are afforded to all persons regardless of citizenship. More recently they have been afforded an added protection by the act of the United States in subscribing to the United Nations Charter, Article 55 of which has pledged this country to promote "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

The United Nations Charter is a treaty, duly executed by the President and ratified by the Senate (51 Stat. 1031). Under Article VI, Section 2 of the Constitution such a treaty is the "supreme Law of the Land" and specifically, "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The right to work has long been recognized as a fundamental human right in American law.<sup>15</sup> The laws of California attempt to deny to Japanese this fundamental right in contravention of the international obligations of the United States.

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<sup>15</sup> *Allgeyer v. State of Louisiana*, *Steele v. Louisville & Nashville R. R. Co.* and *Truax v. Raich*, *supra*.

Historically, no doubt has been entertained as to the supremacy of treaties under the Constitution. Thus Madison, in the Virginia Convention, said that if a treaty did not supercede existing state laws, as far as they contravene its operation, the treaty would be ineffective.

"To counteract it by the supremacy of the state laws would bring on the Union the just charge of national perfidy, and involve us in war."<sup>16</sup>

While it is true that Japan is not a party to the United Nations Charter, the treaty obligations of the United States under the Charter are not limited simply to nationals of the other member nations. It has now become clear by the action of our own government and of other governments in international affairs that the treatment of any minority group within any country is a proper subject of international negotiations.<sup>17</sup>

Official spokesmen for the American State Department have expressed concern over the effect racial discrimination in this country has upon our foreign relations and the then Secretary of State, Edward R. Stettinius, pledged our

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<sup>16</sup> 3 Elliotts Debates 515; see also *United States v. Belmont*, 301 U. S. 324—"In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And, when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision."

<sup>17</sup> See Raphael Lemkin, "Genocide as a Crime under International Law," *Am. J. of Int. Law*, Vol. 41, No. 1 (Jan. 1947), p. 145.



government before the United Nations to fight for human rights at home and abroad.<sup>18</sup>

The interest of the United States in the domestic affairs of the nations with whom we have signed treaties of peace following World War II can be seen from the provisions in the peace treaties with Italy, Bulgaria, Hungary and Rumania, and particularly with settlement of the free territory of Trieste, in all of which we specifically provided for governmental responsibility for a non-discriminatory practice as to race, sex, language, religion, and ethnic origin.<sup>19</sup> Our interest was in no way limited to treatment of American nationals.

The federal government having acted in the field of International Law and pledged our government to protect human rights and fundamental freedoms, no state within the union has the right to deny to any person such right or freedom upon racial grounds.

There cannot be any question that this legislation violates the letter and the spirit of the treaty obligations of the United States and under our Constitution must fall before the superior power of such treaty.

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<sup>18</sup> McDiarmid, "The Charter and the Promotion of Human Rights," 14 State Department Bulletin 210 (Feb. 10, 1946); and Stettinius' statement, 13 State Department Bulletin, 928 (May, 1945). See also letter of Acting Secretary of State Dean Acheson to the F. E. P. C. published at length in the Final Report of F. E. P. C. reading in part, "the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries."

<sup>19</sup> See description of these provisions in, "Making the Peace Treaties, 1941-1947" (Department of State Publications 2774, European Series 24); 16 State Department Bulletin 1077, 1080-82.

### **Conclusion**

The actual effect of the California statute is to deny upon the basis of race, to a group of persons residing therein a right secured to all other persons. That this is discrimination under the Fourteenth Amendment has been clearly established in numerous cases before this Court. The Constitution protects all persons from discriminatory state action solely on the basis of race and prohibits the unequal application of the law.

It is respectfully submitted that the issues raised by the petition for certiorari are of such grave importance that this Court should review the decision of the court below.

---

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---

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 533

TORAO TAKAHASHI

vs.

FISH & GAME COMMISSION

BRIEF OF  
AMERICAN VETERANS COMMITTEE (AVC)

*Amicus Curiae*

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April 12, 1948.  
Washington, D. C.





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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

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**No. 533**

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**TORAO TAKAHASHI**

*vs.*

**FISH & GAME COMMISSION**

---

**BRIEF OF  
AMERICAN VETERANS COMMITTEE (AVC)**

**Amicus Curiae**

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This case involves the validity of a State statute the effect of which is to deny to lawful residents of the State the right to work for a living in a common occupation, solely because of their race and ancestry.

**The Interest of the American Veterans Committee**

The American Veterans Committee (AVC) is an organization of veterans of World War II who have associated themselves, regardless of national origin, creed or color, to promote the basic aims for which they fought. AVC's basic aims are set forth in the Preamble to the AVC Con-

stitution adopted at its First National Convention at Des Moines, Iowa, June 14-16, 1946:

"We as veterans of the Second World War associate ourselves regardless of national origin, creed or color for the following purposes:

"To preserve the Constitution of the United States; to insure the rights of free speech, free press, free worship, free assembly and free elections; To provide thorough social and economic security to all; To maintain full production and full employment in our country under a system of private enterprise in which business, labor, agriculture and government cooperate; To promote peace and good will among all nations and all peoples; To support active participation of this nation in the United Nations and other world organizations whose purposes are to improve the cultural, commercial and social relations of all peoples; To provide such aid to disabled veterans as will enable them to maintain the position in society to which they are entitled; To provide such financial, medical, vocational and educational assistance to all veterans as is necessary for complete readjustment to civilian life; To resist and defeat all attempts to create strife between veterans and non-veterans; and To foster democracy. We dedicate ourselves to these aims, and for their attainment we establish this Constitution."

Any statute which denies to lawful residents, solely because of their race or ancestry, the right to work for a living in a common occupation, as does the statute involved in this case, adversely affects AVC's basic aims. AVC's present platform adopted at the Second National Convention in June, 1947, at Milwaukee, Wisconsin, reiterates our determined opposition to "any laws, practices, customs, and usages whereby any person or group by virtue of discrimination due to race, religion, color or sex" is prevented "from obtaining employment" (Plank 149) and our support of "legislation to guarantee fair employment practices

and to provide equal job opportunities" (Plank 150). *The AVC Bulletin*, "AVC Platform Supplement," Vol. 2, No. 11, p. 4 (August 1947). (National newspaper of AVC). For these reasons, AVC files this brief as *amicus curiae* urging this Court to hold that section 990 of the California Fish & Game Code is invalid insofar as it denies to lawful residents of California, because of their race and ancestry, the right to work for a living in a common occupation.

### **The Facts**

The petitioner, Torao Takahashi, was born in Japan, of Japanese ancestry. He immigrated lawfully to the United States more than 40 years ago and has been a lawful resident of California since 1907. From 1915 to 1942, under annual licenses issued to him by the California Fish & Game Commission, he worked continuously and exclusively as a commercial fisherman. In 1942 he was evacuated from California by the Army along with all other persons of Japanese ancestry. Upon his lawful return to California in 1945 he again applied to the Fish & Game Commission for a commercial fishing license. The license was denied solely because he had been born in Japan of Japanese ancestry and was therefore a "person ineligible to citizenship" under the naturalization laws of the United States (8 U. S. C. 703) to whom the issuance of a license was forbidden by section 990 of the California Fish & Game Code, as amended in 1943 and 1945. He has been unable to secure other employment. He has two sons and two sons-in-law who are American citizens by birth and who have served in the Armed Forces of the United States (R. 1, 2).

Section 990 of the California Fish & Game Code requires "every person who uses or operates or assists in using or operating any boat. . . . to take fish. . . . for profit" or who brings fish ashore "at any point in the State for purpose of selling the same," to procure a commercial fishing



license. Such a license "may be issued to any person other than a person ineligible to citizenship." A license may also be issued to any corporation authorized to do business in California "if none of the officers or directors. . . and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship." Fishing without a license is a misdemeanor. Section 1410, California Fish & Game Code.

The Superior Court of California in and for the County of Los Angeles held that section 990 was unconstitutional (R. 11-18) and ordered the Fish & Game Commission to issue a commercial fishing license to the petitioner (R. 21). The Supreme Court of California, by a 4 to 3 decision, reversed. R. 30-53; 30 Adv. Calif. 723, 185 Pac. (2d) 805 (1947). This Court granted certiorari on March 15, 1948.

## ARGUMENT

### **I. The Prohibition in Section 990 of the California Fish & Game Code Against the Issuance of a Commercial Fishing License to Lawful Residents of California Who Are "Ineligible to Citizenship" Unconstitutionally Deprives Them of the Right to Work for a Living in a Common Occupation Since the Prohibition Is Based on Racial Discrimination and on an Arbitrary and Unreasonable Classification.**

This Court has held that a State may not "deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. . . . It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U. S. 33, 41 (1915). This Court has also held that a State may not, solely because of race or

ancestry, deny to some persons any right or privilege offered to other persons. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Sipuel v. Board of Regents*, 332 U. S. 631 (1948).

### **A. The Purpose and Effect of the Statute Is Racial Discrimination**

The legislative history of section 990 conclusively demonstrates that its sole purpose and effect is to discriminate against alien Japanese lawfully resident in California. When first enacted in 1909 (Calif. Stats., 1909, ch. 197, p. 302), the law authorized issuance of fishing licenses to any person upon payment of a license fee of \$2.50 by a citizen and \$10 by a non-citizen. Under the 1917 amendment (Calif. Stats., 1917, ch. 533, p. 686, 687), any person could secure a commercial fishing license upon application and payment of \$10. In 1933, this law was codified as section 990 (Calif. Stats., 1933, ch. 73, p. 394, 479). Less than two months after the codification, section 990 was amended to prevent the issuance of a license to any person who had not "continuously resided within the United States for a period of one year immediately prior to. . . . application for such license" (Calif. Stats., 1933, ch. 696, p. 1784). This restriction was held unconstitutional in *Abe v. Fish & Game Commission*, 9 Calif. App. (2d) 300, 49 P. (2d) 608 (1935). But after all persons of Japanese descent were evacuated from California and other western States by the Army in 1942, section 990 as amended to single out "alien Japanese" as the only persons not qualified for a license. Calif. Stats., 1943, ch. 1100, p. 3039, 3040. In 1945, a Committee of the California Senate, created "to investigate the questions of Japanese resettlement involving the relocation of Japanese internees and evacuees," indicated that the singling out of "alien Japanese" was unconstitutional and recommended "that this legal question . . . be eliminated by an amend-

ment . . . which would make it apply to any alien who is ineligible to citizenship." *Report of the Senate Fact-Finding Committee on Japanese Resettlement, May 1, 1945*, p. 5 (Calif. State Printing Off., 1945). In accordance with this recommendation, section 990 was amended by substituting "person ineligible to citizenship" for the phrase "alien Japanese." Calif. Stats., 1945, ch. 181, p. 659, 660.

This change of label was but an attempted veil to obscure the racism of the statute. It was not made to further the conservation of fish or primarily to reach the insignificant number of persons in California, other than those of Japanese ancestry born outside the United States, who were ineligible to citizenship. The Senate Fact-Finding Committee, the Report, and the 1945 amendment were concerned only with the Japanese aliens who were being resettled from the relocation centers and with the likelihood that the 1943 statute would be declared unconstitutional. The attempt of the Supreme Court of California to construe section 990 as non-racist in purpose by holding that the Senate Fact-Finding Committee represented "the opinion of only a few of the legislative body and cannot, with any certainty, be said to express the intention of the legislature as a whole" (R. 40; 185 P. (2d) 805, 813) patently distorts the fundamental canon of statutory construction that the reports of the legislative committee are relevant to determine the legislative intent. *Harrison v. Northern Trust Co.*, 317 U. S. 476 (1943). The amendment effected no real substantive change. It was a transparent effort to apply the same discrimination, but by circumlocutionary description instead of by name. The statute remained essentially racist in purpose and impact and continued to single out aliens of Japanese ancestry in denying to them, while permitting to all others, the right to work for a living in the common occupation of commercial fishing. Cf. D. O. McGovney, "The Anti-Japanese Land

Laws of California and Ten Other States," 35 Calif. L. Rev. 7, 43-47, 51-52 (March 1947).

The opinions of this Court establish that freedom from racial discrimination by governmental power is a field specially protected under our Constitution. *Yick Wo v. Hopkins*, 118 U. S. 356, 374 (1886); *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944); *Smith v. Texas*, 311 U. S. 128, 130 (1940). It has been said that statutory restrictions against a racial group, which "never can" be justified by "racial antagonism," may sometimes be justified by "pressing public necessity" such as the threat of imminent military invasion in 1942. *Korematsu v. United States*, 323 U. S. 214, 216 (1944). But in this case it is clear that "there is absent the compelling justification which would be needed to sustain discrimination of that nature." *Oyama v. California*, 332 U. S. 631, 640 (1948). The guise here adopted by California cannot, therefore, withstand the withering flame of the Constitution against such racial discrimination by governmental authority—the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v. Wilson*, 307 U. S. 268, 275 (1939); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 525-527 (1926); *Buchanan v. Warley*, 245 U. S. 60 (1917); *City of Richmond v. Deans*, 37 F. (2d) 712 (C.C.A. 4th 1930), *aff'd* 281 U. S. 704 (1930); *In re Ah Chong*, 2 Fed. 733, 6 Sawy. 451 (C.C., D. Calif. 1880); *Brotherhood of Locomotive Firemen v. Tunstall*, 163 F. (2d) 289, 293 (C.C.A. 4th 1947), cert. den. 332 U. S. 841 (1947).



**B. The Distinction Between Persons "Eligible" and Persons "Ineligible" to Citizenship Rests upon an Arbitrary and Unreasonable Classification Insofar as the Regulation of Commercial Fishing Is Concerned.**

Even assuming *arguendo* that section 990 is not racist in character and is not intended to effect a discrimination on the basis of race, the prohibition against the issuance of commercial fishing licenses to persons "ineligible to citizenship" still runs afoul of the 14th Amendment. We need not here argue the question whether the State of California may constitutionally regulate the taking of free swimming fish from the ocean waters of the three-mile belt adjacent to the coast of California and from the waters of the high seas beyond that three-mile belt (compare *United States v. California*, 332 U. S. 19, 36-38 (1947) with *Toomer v. Witsell*, No. 415, U. S. Sup. Ct., Oct. Term, 1947, argued January 13, 1948). Even if California may constitutionally regulate the fishing here involved, the 14th Amendment prohibits the State from making arbitrary and unreasonable classifications. The "ultimate test of validity" of a classification is whether it has a fair and substantial relation to the object which the legislation seeks to accomplish—whether the statute has a rational basis—"whether the differences . . . are pertinent to the subject with respect to which the classification is made." *Asbury Hospital v. Cass County*, 326 U. S. 207, 214 (1945); *Sage Stores Co. v. Kansas ex rel. Mitchell*, 323 U. S. 32 (1944); *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580, 583 (1935); and see *Pfeiffer Brewing Co. v. Bowles*, 146 F. (2d) 1006, 1007 (E.C.A. 1945), *cert. den.* 324 U. S. 865 (1945). Section 990 cannot meet this test.

Under this statute all persons who fish for profit or who bring fish ashore for sale must secure a license from the State. Licenses are available to *any person in the world*

except one class of persons—aliens ineligible to citizenship. The object of this prohibition is said to be conservation of fish. Yet it does not seek to control the amount of fish taken, nor would it do so since the needs of the market will in fact be met by the capture of fish by others than the restricted class, and hence no conservation purpose can possibly be served by the classification. Thus it is clear that the distinction made between aliens ineligible to citizenship and other classes of persons is not relevant to the conservation of fish. The prohibition against alien Japanese will not help the State to conserve fish—the purported aim of the statute. It will merely effect a gross economic discrimination against a racial group of lawful residents, and as such is an arbitrary and unreasonable classification within the meaning of the 14th Amendment. This is emphasized by the fact that although persons ineligible to citizenship are forbidden to engage in commercial fishing, any person, including a Japanese alien, may secure a license for *sport* fishing. Section 428, Calif. Fish & Game Code, as amended by Calif. Stats., 1947, ch. 381, pp. 941, 942, ch. 1329, pp. 2884, 2885.

In its decision below, the Supreme Court of California stated (R. 38; 185 P. (2d) 805, 812):

“In many decisions the courts have upheld a classification of persons by which nonresidents and aliens were denied hunting and fishing privileges. In so far as conservation is concerned, it is just as reasonable to classify aliens upon the basis of eligibility to citizenship.”

We need not here be concerned as to the question whether a State may constitutionally discriminate between citizens and aliens in prescribing who may or may not take fish for their own use or pleasure from waters within its jurisdiction (compare *Patson v. Pennsylvania*, 232 U.S. 138 (1914))

(hunting) and *McCready v. Virginia*, 94 U. S. 391 (1876) (oysters in Ware River). The fact here is that section 990 of the California Fish & Game Code does not draw the line between *citizens* and *aliens*—it draws the line between persons “ineligible to citizenship” and *all* other persons. The classification, therefore, consists of a distinction between two groups of aliens. Accordingly, it is entirely immaterial that this Court, when invalidating the Arizona statute in *Truax v. Raich*, 239 U. S. 33 (1915) which had denied aliens the right to work for a living in a common occupation, distinguished cases upholding statutes pertaining to “the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States” (239 U. S. 33, 39-40). For in the present case, only some aliens—those “ineligible to citizenship”—are excluded; all other aliens, whether they reside in the State or not, are not excluded. We urge that such distinction between one alien and another alien is arbitrary and unreasonable, at least insofar as the regulation by a State of commercial fishing is concerned, and therefore constitutes a denial of the equal protection of the laws required by the Fourteenth Amendment of the Constitution.

Almost 68 years ago Circuit Judge Sawyer probed to the heart of the matter in an extraordinarily similar case. *In re Ah Chong*, 2 Fed. 733, 6 Sawy. 451 (C. C., D. Calif. 1880). The petitioners there, Chinese residents of California, sued out writs of *habeas corpus* after having been convicted for fishing “in San Pablo Bay, within the State” under a statute prohibiting fishing by “aliens incapable of becoming electors of the State.” Circuit Judge Sawyer held (2 Fed. 733, 737):

“To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from

any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws; contrary to" [the Fourteenth Amendment].

The present Supreme Court of California, in its decision below, brushed aside Circuit Judge Sawyer's 1880 decision and upheld the reasonableness of the distinction between persons "eligible" and those "ineligible" to citizenship, as applied to the regulation of commercial fishing, primarily on the basis of *Terrace v. Thompson*, 263 U. S. 197 (1923). That case held (at p. 220):

(1) "Two classes of aliens inevitably result from the naturalization laws—those who may and those who may not become citizens. The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens" a "privilege."

(2) "It is obvidus that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of; the state, and, so lacking, the state may rightfully deny him" a "right."

But it does not necessarily follow, merely because "two classes of aliens inevitably result from the naturalization laws", that the State of California may adopt that distinction for the entirely different purpose of permitting or denying persons the right to work for a living in the common occupation of commercial fishing. We need not here argue the question whether this distinction is constitutional in the naturalization laws. The fact, however, is that this discrimination in the naturalization laws has been assumed to be valid on the supposition that Congressional power over naturalization is unlimited: *Terrace v. Thompson*, 263 U. S. 197, 220 (1923); *Schneiderman v. United States*, 320 U. S. 118, 131-132 (1943). But even the Supreme Court



of California in its decision below admits that California's power to regulate commercial fishing is "subject to constitutional limitations against discrimination" (R. 36; 185 P. (2d) 805, 810). If California can constitutionally make racial discrimination with regard to this *limited* power merely because Congress makes racial discrimination with regard to the *unlimited* power over naturalization, then aliens "ineligible to citizenship" would have no constitutional protection against any possible discrimination which California might choose to impose on them. But would this Court ever uphold a State statute which provides that any person "ineligible to citizenship" who is charged with a crime shall be deemed guilty without trial?

Furthermore, it is unrealistic to attempt to justify California's use of the naturalization discrimination in section 990 by saying that "one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state." By the use of this naturalization classification, section 990 denies the right to earn a living in a common occupation, solely because of the accident of ancestry and place of birth, to persons who, like the petitioner in this case, had been lawfully admitted into the United States by authority of the Federal Government, have lived in California for many years, law abiding and participating in its community affairs, paying taxes, desiring to become citizens, and enriching the State and their community with their labor and their American children, many of whom served in the United States Armed Forces and some of whom now are members of the American Veterans Committee. At the same time, section 990 permits the issuance of commercial fishing licenses to other aliens who, although eligible to United States citizenship, have never been admitted by the Federal Government for residence in the United States, are not and have not been residents of California, have not participated in the com-

munal affairs of the State, and have no desire to become American citizens. Which one of these two groups most "lacks an interest in, and the power to effectually work for the welfare of, the State"?

Thus, the distinction in Section 990 between persons "eligible" and those "ineligible" to citizenship has no possible justification for application by the State of California to the regulation of commercial fishing, unless racial antagonism is a valid justification. Justices Murphy and Rutledge in their concurring opinion in *Oyama v. California*, 332 U. S. 633, 663-672 (1948) have shown the utter unreasonableness of the application of this distinction by the State of California in *any* manner to its lawful residents. Indeed, the very fact that the Federal government had admitted these Japanese-born persons for permanent residence anywhere within the United States along with other residents of the United States clearly negatives the reasonableness of a State classification which denies them the right to work for a living in a common occupation by fishing in the waters off California and bringing the fish ashore for sale, while permitting this to be done not only by citizens, but also by all other aliens, non-residents as well as residents of California and the United States. Since "Congress, in the exercise of its exclusive power over immigration . . . decided that certain Japanese, subject to Federal law, might come to and live in any one of the States of the Union . . . California should not be permitted to erect obstacles designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country." Justices Black and Douglas, concurring in *Oyama v. California*, 332 U. S. 633, 649 (1948); *Truax v. Raich*, 239 U. S. 33, 42 (1915); *Chy Lung v. Freeman*, 92 U. S. 275 (1875). We therefore urge this Court to overrule *Terrace v. Thompson*, 263 U. S. 197 (1923), its companion cases, *Porterfield v. Webb*, 263 U. S. 225 (1923);

*Webb v. O'Brien*, 263 U. S. 313 (1923), and *Frick v. Webb*, 263 U. S. 326 (1923), and its offspring *Cockrill v. California*, 268 U. S. 258 (1925), insofar as these decisions, on the spurious basis that a State may reasonably apply this naturalization distinction, sustained state statutes making racial discriminations against people of Japanese origin lawfully residing in this country.

If California may here make an individual's eligibility to citizenship determinative of his right to engage in commercial fishing, it could by the same test qualify his right to engage in other occupations where the issuance of a license is required. It need not stop at occupations now licensed. It could also then condition the right to engage in *any* gainful occupation by requiring that a license be obtained and thus could successfully bar aliens of Japanese ancestry from all gainful employment by merely making them ineligible to secure any license whatsoever. In short, California could thus in effect overrule the decision of this Court in *Truax v. Raich*, *supra*, and deprive Japanese aliens of the protection of the Federal Constitution in their effort to earn a living, although they are lawful residents of this country.

## **II. The Racial Discrimination in Section 990 Violates a Treaty of the United States, Namely, the Charter of the United Nations, and Is Therefore Invalid.**

The Charter of the United Nations is a treaty of the United States made and ratified under the Treaty power of the Constitution (Article VI) which provides that "all treaties made . . . under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Under the Charter, the United States has pledged to cooperate with the United Nations to "promote universal respect for, and observance of, human

rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Articles 55(c), 56, United Nations Charter, 59 Stat. 1031, 1045-1046 (1945).

One of the most fundamental of all human rights and freedoms is the right to work for a living in a common occupation. *Truax v. Raich*, 239 U. S. 33, 41 (1915); *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746, 762 (1884); *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590 (1897); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); Revised Statutes, Sec. 1977, 8 U. S. C. 41; *In re Tiburcio Parrott*, 1 Fed. 481, 508 (C. C., D. Calif. 1880).

This right to work for a living is clearly one of the human rights and fundamental freedoms mentioned in Article 55(c) of the Charter of the United Nations. See January, 1946 issue of 243 *Annals of the American Academy of Political and Social Science* on "Essential Human Rights", pp. 13, 14, 23, 27-39, 41-42, 66; *United States Proposal for a Declaration of Human Rights* to Second Session of United Nations Commission on Human Rights, Articles 9 and 10, 17 Dept. of State Bull. 1075, 1076 (Dec. 7, 1947); *The Evening Star*, Washington, D. C., p. A-7 (Dec. 1, 1947); *Declaration on Human Rights*, adopted by United Nations Commission on Human Rights, December 17, 1947, Article 29, Press Release SOC/307 (17 Dec. 1947) by United Nations Dept. of Public Information, Press and Publications Bureau, Lake Success, N. Y.

Since Section 990 of the California Fish & Game Code denies to some persons, solely because of their racial ancestry, this "human right and fundamental freedom," which the Charter expressly states applies "for all" persons "without distinction as to race," the racial discrimination in Section 990 is plainly inconsistent with the Charter. Under Article VI of the United States Constitution, the supremacy of this Federal treaty provision over-rides "any-



thing in the . . . laws of any State to the contrary notwithstanding." *United States v. Pink*, 315 U. S. 203, 231-233 (1942); *Asakura v. Seattle*, 265 U. S. 332, 341 (1924); *Santovincenzo v. Egan*, 284 U. S. 30, 40 (1931); *Nielson v. Johnson*, 279 U. S. 47, 51-52 (1929); *Clark v. Allen*, 331 U. S. 507, 517 (1947). Indeed, this Court could not permit the continued enforcement of Section 990 without thereby itself violating the pledge of this Nation to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race."

### Conclusion

We respectfully urge that no statute should be upheld which denies to lawful residents, solely because of their race and ancestry, the right to work for a living in a common occupation and that the prohibition in Section 990 of the California Fish & Game Code against the issuance of a commercial fishing license to persons "ineligible to citizenship" should therefore be declared invalid.

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April 12, 1948.  
Washington, D. C.





FILE COPY

IN THE  
Supreme Court of the United States

October Term, 1947

No. 533

TORAO TAKAHASHI,

*Petitioner,*

*vs.*

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTIAN and WILLIAM SILVA as members thereof.

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(Continued on Inside Cover)





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IN THE  
**Supreme Court of the United States**

October Term, 1947

No. 533

TORAO TAKAHASHI,

*Petitioner,*

*vs.*

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTIAN and WILLIAM SILVA as members thereof.

Brief of the Japanese American Citizens League,  
Amicus Curiae.

The Interest of the Japanese American Citizens  
League.

The Japanese American Citizens League<sup>1</sup> is familiar with the problems of persons of Japanese ancestry in the

<sup>1</sup>Japanese American Citizens League (JACL)—A Statement of Policy, January 1947.

"The Japanese American Citizens League is in existence because there are problems and adjustments which are peculiar to Americans of Japanese Ancestry. The term 'Japanese American' in the name of the organization is used merely to identify the problems, not identify the constituency, or to describe the organization. Moreover, the designation 'Japanese American' does not limit the membership of the organization exclusively to Japanese Americans. On the contrary, we encourage and solicit other Americans to join with us for we need them to build the strongest possible organization. We believe that as we work for the solution of the problems peculiar to our own minority group, we are helping constructively thereby to solve the total problems of all minorities.

"We are often asked: 'Why does not JACL take a stand upon important issues other than just those which affect Japanese

State of California. Through its educational program, false and misleading propaganda designed to prejudice the public mind is combatted.<sup>1a</sup> Up to the outbreak of hostilities with Japan, considerable progress had been made in bringing about a better understanding and appreciation of the Japanese population within the state. Then war hysteria ran rampant and destroyed whatever advance that had been achieved.

What the racists and "white supremacy" forces had not been able to effectuate after years of insidious repetition of lies, distortions and half-truths, the shock of the Pearl Harbor attack and the hatred engendered against descendants of the enemy country enabled the attainment

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Americans and other groups as racial minorities?" Our basic premise is that when we start taking stands as an organization upon other matters, we begin to set ourselves apart as a group. Upon such issues we believe that our individual members should express themselves as individual Americans and join actively with whatever groups and organizations in their communities best express their own thinking and points of view. Moreover, the membership of JACL is made up of various individuals with different viewpoints. To take stands upon issues where opinions are divided would be to create disunity among our group. We hold, however, that all of our membership can go along and work together upon the basic problems which affect people of Japanese ancestry.

"When the time comes when we Americans of Japanese ancestry face only those problems which are no different from those faced by all other Americans, then JACL will have served its purpose and can be liquidated. In the meantime, we pledge and devote ourselves and our efforts to the hastening of that day."

*People in Motion*, published by the U. S. Department of Interior, p. 209, Government Printing Office, Washington, D. C. (1947).

<sup>1a</sup>The Pacific Citizen is published at 415 Beason Building, Salt Lake City 1, Utah. The United States Department of the Interior in its report on the Postwar Adjustment of the Evacuated

of their goal: ridding California of all persons of Japanese ancestry.

Mass evacuation from their homes and confinement behind barbed wire fences in isolated, undeveloped areas and the consequent suspension of their civil rights, made the outlook for persons of Japanese ancestry in this country one of gloom and despair. Nevertheless, the Japanese American Citizens League staunchly and loyally adhered to its faith in American citizenship and democracy. It continued to bolster the morale of the disillusioned citizens of Japanese ancestry on the one hand and worked to present to the American public and government the desire of the Japanese Americans to serve in every possible manner their country in her hour of direst need.

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Japanese Americans (People in Motion), United States Government Printing Office (1947), relies heavily on it for its sources of information. Also, the monthly "Summary on Race Relations," Fisk University, Nashville, Tennessee, uses material from this weekly publication extensively. JACL is the publisher.

Of the Pacific Citizen, Professor Eugene V. Rostov of the Yale University Law School said: "(It) is an indispensable source of material on events and attitudes with respects to the process of evacuation, internment and relocation." (54 Yale Law Journal 489.)

Richard J. Walsh, editor of Asia & Americas, said:

"I admire it for its Americanism, its clear loyalty to our country. I admire it for the wisdom and good temper with which it has dealt with the treatment given to our Japanese American citizens."

Allen Eaton of the Russell Sage Foundation of New York City said:

"Because of its service in a unique field affecting directly the lives of 70,000 Japanese American citizens, and indirectly, but vitally, all other citizens of this Republic, and because in the days to come our hope rests upon the kind of intelligence and devotion to American ideals which the Pacific Citizen represents, it deserves whatever support any of us can give." (Leaflet of JACL, published 1944.)



The respect and confidence reposed in the JACL by the Government leaders<sup>2</sup> as well as Americans in all walks of life<sup>3</sup> attest to the effective work that was carried out during the trying war years.<sup>4</sup> What the Japanese Americans contributed on the home front and the valors on the battle-

<sup>2</sup>"The President has asked me to express his appreciation of the action of the Japanese American Citizens League in pledging support and assistance during the present emergency. Such assurances of cooperation are most gratifying to him."

By Wayne Coy, Special Assistant to the President, written to Mr. Mike Masaoka, National JACL Secretary, on February 6, 1942. (Brief of JACL, *Hirabayashi v. United States*, 320 U. S. 81.)

"Remarkably cooperative, for example, the Japanese American citizens have an organization called the Japanese American Citizens League, and it has carried on a most vigorous educational program among the total population, urging 100 per cent cooperation."

"In fact, I just cannot say things too favorable about the way they have cooperated under the most adverse circumstances."

By Dr. Milton S. Eisenhower, then the director of War Relocation Authority, testifying before Congressional Hearing on Appropriations, June 15, 1942, Washington, D. C. (Brief of JACL, *Hirabayashi v. United States*, *supra*.)

<sup>3</sup>"I have been deeply impressed with the sincerity and loyalty of the League members and of their sense of responsibility in these difficult times. I hope that every encouragement and help can be given to their important work."

Miss Pearl Buck, January 27, 1944. (Leaflet of JACL, 1944.)

"During the past 25 years I have worked with groups whose rights were attacked, and no group has showed more cooperation or more complete understanding of democratic principles than the JACL. Many Americans can learn from the JACL the meaning of true Americanism."

Roger N. Baldwin, Director American Civil Liberties Union, *supra* (Leaflet of JACL, 1948).

<sup>4</sup>"From time to time, JACL National officers sought and secured audience with high officials of the Department of War, Department of Justice, and of the War Relocation Authority, thus being given an opportunity to present Japanese American needs to Federal Officials at policy level, and to serve as an authoritative vehicle of information to the evacuated people. The JACL leadership was also concerned with public relations at the community level, and was successful in securing as sponsors a considerable number of persons prominent in national affairs." *People in Motion*, Department of Interior, p. 208 (1947).

fields of Europe and Pacific of the Nisei GI's have been the unrefutable answer to the doubts and suspicions of the pre-war days cast upon their loyalty.<sup>5</sup>

When the now famous 442nd Regimental Combat team, composed of volunteers, was organized, the JACL gave its full support; its executive secretary was among the first to offer his services.<sup>6</sup> Thousands, despite the illegal detention behind barbed wire fences,<sup>7</sup> and the suspension of their rights as citizens, responded to the call.<sup>8</sup> The record established will long be remembered in the annals of the American military history of World War II.<sup>9</sup>

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<sup>5</sup>*They Work for Victory*, published by the Japanese American Citizens League under grant from Carnegie Endowment for International Peace, Washington, D. C. (1945).

<sup>6</sup>"When the Army opened its ranks to volunteers, the JACL actively supported the forming of the 442nd Regimental Combat Team . . ." *People in Motion*, Department of Interior, p. 208 (1947).

<sup>7</sup>*Ex parte Endo*, 323 U. S. 302.

<sup>8</sup>Official Army records released to the JACL in May of 1947, and carried in the *Pacific Citizen* of May 17, show that a total of 33,320 persons of Japanese ancestry had served in the wartime and postwar Army of the United States, up to that time. Of these 30 were Japanese aliens." *People in Motion*, Department of Interior, p. 216 (1947).

<sup>9</sup>Partial award list of 442nd Regimental Combat Team: Individual Awards—Congressional Medal of Honor, 1; Distinguished Service Cross, 47; Distinguished Service Medal, 1; Oak Leaf Cluster to Silver Star, 12; Silver Star, 342; Legion of Merit, 17; Soldier's Medal, 15; Oak Leaf Cluster to Bronze Star Medal, 38; Bronze Star Medal, 810; Air Medal, 1; Purple Heart Medal, 3600; Oak Leaf Clusters to the Purple Heart Medal, 500; Army Commendation, 36; Division Commendation, 87; Croix De Guerre (French), 12; Palm to Croix De Guerre (French), 2; Croce Al Merito Di Guerra (Italian), 2; Medaglia De Bronzo Al Valor Militare (Italian), 2. Unit Awards—Distinguished Unit Citation, 7; Meritorious Service Unit Plaque, 2; Army Commendation, 1.

<sup>10</sup>"Americans"—The Story of the 442nd Combat Team—By Orville C. Shirey, Infantry Journal Press, Washington, D. C., p. 101.

<sup>11</sup>See footnote on page 101 of "Americans."

This brief *amicus* is presented in order, to acquaint the Court with the facts that the JACL had acquired from the several campaigns to defeat the discriminatory fishing bills in the California State legislature.

The instant case falls into the pattern of litigation with which the JACL has always concerned itself.<sup>9</sup> Not only is the right of a Japanese national to engage in a common occupation involved, but also the more fundamental one of earning a livelihood. And if today California can distinguish between persons, solely because of the accident of birth or racial background, as to who may and who may not engage in a particular field of employment, tomorrow other states, and perhaps even the Federal Government, may use race, color, creed, or national origin as the measure of the right to live.

### History of Fishing by Japanese in California:

The alien Japanese who are being denied the right to obtain licenses for commercial fishing by the State of California through Section 990 of the Fish and Game Code<sup>10</sup> have made important contributions to the development of

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<sup>9</sup>JACL has filed briefs *amicus* in the following cases:

*Hirabayashi v. United States*, 320 U. S. 81; *Korematsu v. United States*, 323 U. S. 239; *Regan v. King*, 134 F. (2d) 413, cert. den. 319 U. S. 753; *Oyama v. California*, 68 S. Ct. 269; *Mendez v. Westminster School District*, 161 F. (2d) 774; *Hurd v. Hodge*, No. 290, October Term, 1947; *Amer-Kim v. Superior Court of Los Angeles County*, No. 429, October Term, 1947.

<sup>10</sup>Stats. 1945, Chap. 181, Sec. 3.

the fishing industry of that state. They had been engaged in this occupation and earned their livelihood for many years prior to the outbreak of war with Japan.<sup>11</sup>

### Northern California.

The history of the Japanese in northern California fishing dates back to 1892, when about six fishermen were employed by an American fish cannery in Monterey bay for squid fishing. This first contingent was followed in 1900 by eight others who attempted salmon fishing. By 1910 about 145 Japanese were employed by American canneries in this area. They fished for yellowtail, tuna, sea bass, smelt, rock cod, sardines and barracuda.

The first Japanese to engage in abalone fishing was Ootosaburo Noda, who began fishing at Point Lobos near Monterey. It is interesting to note that in 1896 Noda and a partner of his invited an expert from Japan to develop

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<sup>11</sup>The factual material set forth in this section of the brief, unless otherwise noted, has been obtained from the article by Eiji Tanabe in the Pacific Citizen, March 27, 1948, and from the brief of Walter T. Tsukamoto filed in opposition to Assembly Bills 336, 1883, 2414, 2415, and Senate Bills 278 and 736 of the 1939 session of the California Legislature to amend Section 990.

(A copy of Mr. Tsukamoto's Brief is being filed with the Clerk of this Court.)

Eiji Tanabe is the Pacific Southwest regional office director of the Japanese American Citizens League, Los Angeles, California. He has translated materials from the "History of the Japanese in America," published by the Japanese Association of America, San Francisco, California, 1940. Tanabe served as a senior instructor of Japanese at the University of Michigan Army Military Intelligence School, Japanese Language Section, during the war years.

Walter T. Tsukamoto was the legal counsel for the JACL in 1939 and is now serving as Lieutenant-Colonel, JAGD, United States Army of Occupation, SCAP, Tokyo, Japan.



a new method of abalone fishing. The Department of Agriculture and Commerce of Japan sent Gennosuke Otani; who was then experimenting with a specially devised diving suit for abalone fishing off the coast of Japan. Otani arrived in the United States in October of 1896. Abalone fishing proved to be successful, and the enterprise expanded into the drying and exporting of abalone. Large quantities were shipped to Japan.

The San Francisco bay area was then virtually virgin fishing grounds. There was an abundance of sardines, but few persons dared to challenge the irregular and dangerous weather conditions. It was Katsuyoshi Hamauchi who first dared the elements and used his net to catch sardines in 1930. Many other Japanese followed him, after he proved the venture a success. Other nationality groups flocked to the area to boost the annual catch of sardines, and the San Francisco bay became one of the largest and richest commercial fishing grounds in the northern part of the state.

The sardine catch gradually climbed until in 1938 it reached 348,852,460 pounds. 1941 was the last year Japanese fishermen were allowed to fish. After Pearl Harbor they were prohibited from this industry and they were subsequently evacuated from the coast.

### Southern California.

The Japanese fishing industry in the southern part of the state began around White Point in 1887 in the preparation of dry abalone. They did not begin to expand their interests in this region until 1900.

The first Japanese to settle around San Pedro harbor arrived in about 1899, but the fishing did not begin until 1902. Abalone and lobster were the principal catches.

Terminal Island, which eventually became the largest and most important Japanese fishing center, was first settled in 1910 by Japanese fishermen who were employees of the San Pedro Fish Canning Company. It was many years before the United States Navy considered using this place. The small island which was covered with sand and rocks and rattlesnakes gradually changed into a liveable village. The peak of the Japanese population on Terminal Island was 3,000.

San Diego was another place where a Japanese fishing village was established in 1899. The peak was reached around 1927 and 1928 and gradually declined.

Oxnard at one time had promise of becoming a fishing center. Plans were made to move the Terminal Island fishing industry to Oxnard since there had been discussion of the U. S. Navy using the entire island for its purposes.

### **Charges Against Japanese Fishermen.**

The excuse of conservation as the reason for the discriminatory amendment to Section 990 of the Fish and Game Code is a recent innovation. Formerly, the legislators and proponents who desired to prevent the alien Japanese from continuing in the industry which they had helped to develop did not exercise any finesse in expressing their prejudiced reasons. They frankly claimed that it was a necessity for national defense and safety.

Considerable propaganda was carried on, accusing the Japanese fishing boats and their captains of engaging in activities outside their business as fishermen.<sup>12</sup>

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<sup>12</sup>"California and the Oriental," by State Board of Control of California, 1920, as amended to 1922, p. 107.

It was also insinuated that these Japanese fishing boats were potential mine-layers, and, fantastic as it may seem, one public official went so far as to say that they were equipped to discharge torpedoes.

Another charge was that the captains of the fishing boats were Japanese naval reservists.

All these false accusations and innuendoes were refuted by non-Japanese in the fishing industry.

The president of the Coast Fishing Company of Wilmington, California, stated:<sup>13</sup>

"As for the resident Japanese supplying the home government with information regarding harbors, coast line, cities, etc., may I point out that at any local ship chandlery or other institution, including certain branches of our own government, there may be had by anyone, upon request or upon payment of a small fee, exact and up-to-date Bathymetrical and Topographical charts, maps and pictures giving marine and harbor soundings, land elevations and promontories, distances, locations, and what not; all compiled by agencies of our government, and with the greatest exactitude. So, we are expected to believe that members of the local Japanese fishing fleet are busily engaged in mapping and plotting our harbors, coast line, etc., and forwarding same to their home government, when common sense should tell us that every Japanese or other alien steamer entering any of our harbors probably has a personnel more capable of acquiring such information than are all members of the fishing fleet combined."

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<sup>13</sup>Mr. S. Hornstein, President of Coast Fishing Company of Wilmington, March 14, 1939, contained in Walter T. Tsukamoto's Brief.

Regarding the use of the Japanese fishing boats as mine-layers and so forth, former U. S. naval officers offered their testimony to refute such possibilities. Also, the president of the Westgate Sea Products Company of San Diego stated:<sup>14</sup>

"If a torpedo was put on one of these Japanese fishing boats, they would not know what it was, let alone know how to fire it. Gunners from a warship, if they went on board one of these Japanese fishing boats and a torpedo was given them, would be just as helpless as the fishermen. The idea of them having compressed air, sufficient to launch a torpedo, is silly. There would not be power enough to discharge a shotgun."

On the subject of the captains of the fishing boats being Japanese naval reservists, the vice president of the Van Camp Sea Food Company, Terminal Island said:<sup>15</sup>

"The Japanese Government has absolutely nothing to do with these boats, nor did it subsidize them in any way. The owners and captains of these boats have been residents of California for many years (20 to 30). I have known them for more than 20 years, or ever since I have been in the fishing business. If they are naval officers, Japan must have had a long vision and started them out 25 years or 30 years ago, before any of these accusations were dreamed of. I don't believe there is a man in Cali-

<sup>14</sup>Mr. Wiley Ambrose, President of the Westgate Sea Products Company of San Diego, March 14, 1935, contained in Walter T. Tsukamoto's Brief.

<sup>15</sup>Mr. B. Houssels, Vice President of Van Camp Sea Food Company, Inc., of Terminal Island, February 27, 1935, contained in Walter T. Tsukamoto's Brief.



fornia in a better position to know the facts relative to the matter than myself, and I am sure there is absolutely no basis for the statements made."

Dr. Edward K. Strong, Jr., Professor of Psychology at Stanford University, and author of books based on studies of the Japanese in California<sup>18</sup> stated in 1935:

"According to the census there are about a thousand Japanese engaged in fishing, primarily out of Monterey and San Pedro. These men have been so engaged in for twenty to thirty years. They are advancing in age, of course, and it won't be so very long before most of them will drop out naturally. There is no indication that their sons are going to follow in their footsteps, so that if we leave the matter alone, as far as I can see the Japanese will be replaced slowly and gradually by other people. For all I can gather children born in this country do not go into fishing in any considerable number, so that if we eliminate the thousand Japanese their work would be taken over by Italians and other nationalities who are to large degree aliens themselves.

"These Japanese fishermen have their homes in Monterey and San Pedro with their families. If they are prohibited to earn their living, we shall have that additional load upon our relief fund. At least their

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<sup>18</sup>Statement March 19, 1935, contained in Walter T. Tsukamoto's Brief.

Dr. Strong supervised the survey of Japanese under grant of the Carnegie Corporation and is author of: "Vocational Aptitudes of Second Generation Japanese in the United States" (1933); "Japanese in California" (1933); "The Second-Generation Japanese Problem" (1935).

children who are American citizens will have a right to relief, even if we were so hard-boiled as to refuse relief to their parents.

"The Japanese fishermen are among the most efficient of our fishermen on the Coast, and if they are eliminated, I imagine there will be serious loss to the canning industry for a season or two until new men can be secured and broken in to the business.

"To me the most serious objection is that it would furnish real evidence of the inability of Californians to play fair with a very small group of Japanese who have lived in the state many years, have been thoroughly efficient in their work, and have behaved themselves in a most remarkable way."<sup>17</sup>

While the Japanese were living in California, they and their friends were able to refute the lies and prevent passage of any discriminatory fishing legislation. The canneries which were the principal employers and buyers of the catches of the fishermen were the strongest champions of the Japanese right to engage in commercial fishing. It was only after the mass evacuation from the West Coast under army orders that the racists were able to push through an amendment to Section 990 of the Fish and Game Code in 1943 whereby only alien Japanese were prohibited from commercial fishing. Subsequently in 1945, a further amendment was made to give a semblance of respectability by inserting the words, "ineligible to citizenship" in the place of "alien Japanese."

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<sup>17</sup>The Brief of Walter T. Tsukamoto contains an exhaustive collection of letters and statements to the same effect.

## The 1943 and 1945 Amendments to Section 990 of the Fish and Game Code in Relation to Anti-Japanese Agitation.

Whether the present provision of Section 990 was passed as a conservation measure or the result of war hysteria and a means to carry out the policy of excluding the alien Japanese from the state should be considered in connection with the public history of the times.<sup>18</sup>

By July 31, 1942, the Commanding General of the Western Defense Command and Fourth Army, acting under the authority delegated to the Secretary of War,<sup>19</sup> had caused all persons of Japanese descent residing in California and in the eastern part of Oregon and Washington, with a few exceptions, to be confined in Assembly Centers under military control.<sup>20</sup> Before the end of October, 1942, most of these "Japanese", both citizens of the United States and aliens, had been transferred to camps operated by the War Relocation Authority, a civilian agency of the Department of Interior.<sup>21</sup>

This drastic and unprecedented action of the federal government toward a group of people who had in common only their national ancestry and physical character-

<sup>18</sup>*In re Ah Chong*, 2 Fed. 735, 737.

<sup>19</sup>Executive Order 9066 (February 19, 1942), and Public Law 503 (76th Congress, March 21, 1942).

<sup>20</sup>U. S. Army, Western Defense Command and Fourth Army, *Final Report Japanese Evacuation from the West Coast, 1942*. Report of Lieutenant General John DeWitt to the Secretary of War (Washington: U. S. Government Printing Office, 1943), pp. 107 and 109.

<sup>21</sup>U. S. Department of the Interior, War Relocation Authority, *The Evacuated People: A Quantitative Description* (Washington: U. S. Government Printing Office, 1947), Table 6, p. 18.

istics which defined them in the popular mind as a "race", conformed almost exactly to the demands of some West Coast pressure groups.

At least two of these organizations whose programs were implemented by the action of the military authorities, the Native Sons of the Golden West and the California Joint Immigration Committee, had records of anti-Oriental agitation extending back to the early 1900's. However, the success of their campaign to "get rid of the Japs" did not put an end to the agitation of the anti-Japanese forces. Early in 1943 they renewed their campaign, this time seeking to prevent the return of the "Japanese", whether United States citizens or aliens, to California after the war.

A summary of this agitation is contained in "*Prejudice: Japanese-Americans Symbol of Racial Intolerance*."<sup>22</sup> It is noted that early in January, 1943, State Senator Clarence C. Ward of Santa Barbara County, undertook a state-wide tour to organize opposition to the return of the "Japanese." The speech of Mr. C. L. Preisker, Chairman of the Board of Supervisors of Santa Barbara County, at one of Ward's meetings, merits quotation as revealing the motives behind the campaign, as well as its objectives:

"We should strike now, while the sentiment over the country is right. The feeling of the East will grow more bitter before the war is over and if we begin now to try to shut out the Japanese after the war, we have a chance of accomplishing something. Now that

<sup>22</sup>*Prejudice*. Carey McWilliams; Little, Brown & Co., 1944; Boston, Mass. See especially Chapter VII, "The Manufacture of Prejudice," pp. 231-273.



all the treaties between the two nations have been abrogated by Japan's war on the United States. Congress is under no treaty obligation and it could easily pass an act ordering all nationals of Japan to return after the peace and forbidding the immigration of others after the war. This would at least relieve us of part of the problem. Maybe the return of the aliens would mean that some of the American-born relatives would follow them. I think the state legislature should memorialize Congress for action. We don't want to see the time return when we have to compete with the Japanese again in this valley."<sup>23</sup>

Other individuals and organizations echoed Mr. Preisker's arguments in more inflammatory language. Notable were the exhortations of the Home Front Commandos, Inc., which had its headquarters in Sacramento:

"Come and hear the facts—Lend your help to Deport the Japs—If you can't trust a Jap, you won't want him as a neighbor—Any good man can become an American citizen, but a Jap is and always will be a Stabber-in-the-back gangster: Rebel. After the war, ship them back to their Rising Sun Empire."<sup>24</sup>

Dr. John R. Lechner, head of the Americanism Educational League of Los Angeles, purported to show the advantages of deporting the American Japanese after the defeat of Japan. In one of his pamphlets outlining the "Japanese menace" he wrote:

"No books on the contrast between our respective national policies, however ably written, could do as much in discrediting the Japanese propagandists and

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<sup>23</sup>McWilliams, *Prejudice*, p. 233.

<sup>24</sup>McWilliams, *Prejudice*, p. 237.

cause as much shame to the Japanese people, as 122,000 Japanese, returning from continental America, spreading through every city and hamlet in Japan, actual personal testimony of the Christian treatment they had received here."<sup>25</sup>

To these organizations can be added the Pacific Coast Japanese Problem League,<sup>26</sup> Home Front Commandos, The No Japs, Inc., Council on Japanese Relation, and California Preservation League.<sup>27</sup>

The California Joint Immigration Committee was identified as the "real force" behind the 1943 agitation, working with and through the Native Sons of the Golden West, the California Department of the American Legion, the State Grange, and the Associated Farmers.<sup>28</sup> An excellent example of the work of the Joint Immigration Committee was the report it prepared for the House Un-American Activities Committee's investigation of Japanese propaganda activities in 1941 which was later incorporated in the hearings of the House Select Committee Investigating Defense Migration in 1942.<sup>29</sup> In 1943 the same

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<sup>25</sup>John R. Lechner, *Playing with Dynamite* (Los Angeles: Americanism Commission, 23rd District American Legion, Department of California, 1943), p. 15.

<sup>26</sup>Pacific Coast Japanese Problem League, *Pacific Citizen*, July 24, 1943; Home Front Commandos, *Pacific Citizen*, August 14, 1943; No Japs Inc., *Pacific Citizen*, December 4, 1943; Council on Japanese Relation, *Pacific Citizen*, January 27, 1945.

<sup>27</sup>*Pacific Citizen*, April 28, 1945.

<sup>28</sup>McWilliams, *Prejudice*, pp. 242-243.

<sup>29</sup>Report of the California Joint Immigration Committee as reproduced in U. S. Congress, House of Representatives, Select Committee Investigating National Defense Migration, *Hearings on Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones*, 77th Cong., 2d Sess., Part 29, San Francisco Hearings, pp. 11084-11087.

material was circulated in pamphlet form under the *imprimatur* of the Native Sons of the Golden West.<sup>30</sup>

Throughout 1943, the California Joint Immigration Committee's point of view was reflected in resolutions of American Legion posts, Chambers of Commerce, and other groups who joined in the movement to "keep the Japs out of California." The State Commander of the California Department of the American Legion, Mr. Leon Happell, stated in a speech at Marysville, California:

"My suggestion is that we put the whole lot of them on the Japanese mandated islands when they have been taken away from Japan at the close of the war. There, under U. S. or United Nations control, they would escape the racial problem that is tough on us and the Japanese.

"If the American Legion has anything to do with it, we will put them away for keeps.

"The Japanese problem is a racial one and will be until we solve it. The whole program is loaded with dynamite."<sup>31</sup>

On the political level, anti-Japanese agitation was fostered, intentionally or unintentionally, by the two Congressional and three state legislative investigation of the relocation program conducted in 1943: (1) a sub-committee of the Senate Committee on Military Affairs; (2) the House Un-American Activities (Dies) Committee; The California legislature's Committee on Un-American

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<sup>30</sup>Native Sons of the Golden West, Committee on Japanese Legislation, *Why the West Coast Opposes the Japanese* (San Francisco: The Committee, 1943), pp. 1-8.

<sup>31</sup>*Pacific Citizen*, February 4, 1943.

Activities; (4) a Fact-Finding Committee on Japanese Resettlement of the California State Senate; and a similar committee of the California State Assembly. Though in all the cases the reports and recommendations of the Committees were less radical than the agitation in the public press, it was the activities of these committees that furnished the newspapers some of their most sensational stories.

It was during the height of the publicity attending the Senate and House Dies Committee investigations that Section 990 of the California Fish and Game Code was amended to read: "A commercial fishing license may be issued to any person other than an alien Japanese."<sup>32</sup> This amendment was introduced on January 18, 1943, approximately at the same time that State Senator Ward set out on his tour to organize Californians against the return of the "Japanese."<sup>33</sup> It was passed by the Assembly on April 9, one month after Senator Chandler of the Senate Committee on Military Affairs, had issued his sensationally publicized statement:

"... in my mind there is no question that thousands of these fellows were armed and prepared to help Japanese troops invade the West Coast right after Pearl Harbor."

The proposed amendment was passed by the Senate on April 23, the day following the announcement of the execution of the American aviators who had been captured following the first raid on Tokyo. At that time the West Coast newspapers were attacking all things Japanese.

<sup>32</sup>California Statutes, 1943, Chapter 1100.

<sup>33</sup>McWilliams, *Prejudice*.



with exceptional vehemence, and few if any took pains to distinguish between the Nipponese war leaders who had ordered the atrocity and the Americans of Japanese descent who condemned the act as unequivocally and bitterly as any of their fellow citizens. Before the Governor had signed the bill on June 8, the advance publicity of the Dies Committee investigation of the relocation centers had been featured by the regional press. The distortions of fact incorporated in these stories helped to keep the public temper and those of the legislators aroused against the American Japanese.

The amendment of the Fish and Game Code of California was only one of the many anti-Japanese bills introduced in the 1943 session of the California legislature.<sup>34</sup>

Whether the California legislators by their actions reflected public opinion in favor of permanently excluding the "Japanese" or helped to mold public opinion to achieve the ends of economically interested pressure groups is

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<sup>34</sup>An article in the *Pacific Citizen* of April 1, 1943, summarized the situation as of that date:

"California's senate and assembly are still in session with several bills, resolutions and memorials which will affect the future of all the state's evacuated citizens of Japanese origin still in the hands of committees. The Engle, Lowery and Thurman memorials to Congress, seeking the disenfranchisement of United States citizens restrictions upon them, are being opposed by individuals and groups who see in the proposals a threat to the liberties of all Americans as well. Present indications are that these memorials may be allowed to die in committee. At Sacramento, however, the Engle bill to tighten the present provisions of the state's anti-alien land law will probably be sent to Governor Warren shortly for signature. It was approved unanimously by the senate last week.

"Another resolution by Assemblyman Lowery, calling for government requisition of the stored agricultural equipment of the farmer evacuees, was voted by the California assembly last Thursday."

immaterial. In either case, they introduced and passed laws directed against the minority of Japanese descent at a time when anti-Japanese agitation was at one of its high points in the state and in the nation. They were apparently the victims of this agitation, or its originators, or both; the result, in any event, was discriminatory legislation against persons of Japanese extraction.

The link between the 1943 amendment and the bill of 1945 which substituted the word "persons ineligible to citizenship" for the phrase "any person other than an alien Japanese," is provided by the report of the California State Senate Fact-Finding Committee on Japanese Resettlement. This committee announced that it had introduced Senate Bill 413 to make this change because it felt ". . . there is danger of the present statute being declared unconstitutional on the ground of discrimination, since it is directed against alien Japanese."<sup>35</sup>

Like its 1943 predecessor, the 1945 bill was passed at a time when anti-Japanese agitation in California had reached one of its periodic peaks. The occasion for the renewed outburst was the announcement by the military authorities on December 17, 1944, that the general exclusion orders against persons of Japanese descent living in the West Coast military areas were abolished, effective January 2, 1945. This announcement coupled with the decision of this Court in *Ex Parte Mitsuye Endo*,<sup>36</sup> handed down on December 18, 1944, touched off a series of anti-Japanese blasts from the state of Washington to the Mexican border.

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<sup>35</sup>California State Legislature, Senate, *Report of the Senate Fact-Finding Committee on Japanese Resettlement* (Sacramento: State Printing Office, 1945), p. 5.

<sup>36</sup>323 U. S. 283 (1944).

Again various interested groups began to hold meetings, pass resolutions, and issue press releases against the returning "Japanese."

State Senator Irwin Quinn of Humboldt County, a member of the Senate Fact-Finding Committee on Japanese Resettlement, stated on January 15:

♦ "We should investigate them (persons of Japanese ancestry). For years we have been trying to get these fishing licenses away from the Japanese. We think that it is an effrontery to the people of California that the WRA should come here and use every means to return fishing licenses to the Japanese."<sup>37</sup>

The following day approximately 300 residents of Placer County met and specifically agreed to boycott returning Japanese Americans and "persons who do business with Japanese." The meeting was called by Donner Post No. 1942 of the Veterans of Foreign Wars.<sup>38</sup> During the same week, the Monterey Bay Council on Japanese Relations was formed for "sincere, unselfish, and unprejudiced thinking" to "discourage the return of persons of Japanese ancestry to the area."<sup>39</sup>

The grand officers of the Native Sons of the Golden West adopted a four point program for state legislative action: (1) To prohibit persons of Japanese ancestry from fishing in California coastal waters; (2) To "put teeth" into the anti-alien land laws, which at present "allow" the ownership of land by American citizens of Japanese ancestry; (3) To empower the state attorney

<sup>37</sup>*Pacific Citizen*, January 20, 1945.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Pacific Citizen*, January 27, 1945.

general and various county district attorneys to enforce rigidly the escheat provisions of the anti-alien land act; (4) Strict prohibition of Japanese language schools.<sup>40</sup> The similarity of this program to the laws enacted by the 1945 session of the California legislature is remarkable. Equally noteworthy is the similarity of the groups which led the 1943 and the 1945 agitation.

When the first evacuees appeared to reclaim their farms and businesses, threats and rumors of violence were replaced by violence itself.<sup>41</sup> Between the rescission of the general "Japanese" exclusion orders and May 14, 1945, there occurred 15 shooting attacks, 1 dynamiting attempt, 3 cases of arson and 5 threatening visits.<sup>42</sup> So serious was the situation that Secretary of the Interior issued a statement in which he said:

"The shameful spectacle of these incidents of terrorism taking place at the back door of the San Francisco conference, now in session to develop means by which men of all races can live together in peace, must be ended once and for all. I believe that an aroused national opinion, rooted in the indignation of fairminded Americans throughout the country, will be a powerful aid to west coast state and local officials charged with bringing the vigilante criminals to justice."<sup>43</sup>

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<sup>40</sup>*Pacific Citizen*, February 17, 1945.

<sup>41</sup>*Pacific Citizen*, January 6, 13, 20, 1945; February 17, 24, 1945; March 10, 31, 1945.

<sup>42</sup>U. S. Department of the Interior, War Relocation Authority, *The Relocation Program* (Washington: U. S. Government Printing Office, 1946), p. 67; *Pacific Citizen*, May 19, 1945.

<sup>43</sup>U. S. Department of Interior War Relocation Authority, *The Relocation Program* (Washington: U. S. Government Printing Office, 1946), p. 67.



To draw the parallel between the history of Senate Bill 413 and the 1945 wave of anti-Japanese feeling in California, it is noteworthy, that the bill was introduced on January 23, one week after some citizens of Placer County had signed a "boycott the Japanese" agreement, and less than a week after night riders had burned a shed on the property of Sumio Doi near Auburn in the same county and two nights later fired bullets into the same man's home.<sup>44</sup> The bill was passed by the Senate and sent to the Assembly on April 3, while attacks on returning American Japanese continued and the Assembly approved a \$200,000 appropriation to speed prosecutions for violating the state's anti-alien land law. Senate Bill 413 was passed by the Assembly and sent to the Governor on April 27. During the same week the California Preservation League was formed in Sacramento to unify the anti-Japanese groups in the state and promote a campaign to refuse to sell or lease property to American citizens of Japanese ancestry.<sup>45</sup> The bill was signed by the Governor on June 8,<sup>46</sup> four days after State Senator Jack Tenney of Los Angeles had charged that federal civil service authorities had approved the employment of American Japanese "against whom counterespionage charges may be filed at any time." The Senator concluded his remarks by saying:

"It is common knowledge that the FBI and officers of Naval and Army intelligence have not been consulted by the WRA in reference to the character or loyalty of the persons being released."<sup>47</sup>

<sup>44</sup>*Pacific Citizen*, January 27, 1945.

<sup>45</sup>*Pacific Citizen*, April 28, 1945.

<sup>46</sup>Stats. 1945. Chap. 181, Sec. 3.

<sup>47</sup>*Pacific Citizen*, June 9, 1945.

The Senator omitted all reference to the loyalty investigations conducted in 1943 and 1944, and to the decision in *Ex Parte Endo*.<sup>48</sup>

During the 1945 session of the California Legislature which adopted the amendment to the Fish and Game Code, three other bills were passed directed against the alien Japanese group. Senate Bill 139, signed by the Governor on July 9, put escheat actions under the anti-alien land law in the hands of the ~~State Attorney General and im-~~posed the burden of proof on the defendant to show that conveyance was not made to avoid escheat.<sup>49</sup> Senate Bill 414, approved July 17, appropriated \$200,000 for the Department of Justice to enforce anti-alien land laws and carry on escheat proceedings.<sup>50</sup> Senate Bill 415, approved July 9, provided that no statute of limitations was a bar to escheat actions in anti-alien land law cases.<sup>51</sup> A final victory for the anti-Japanese forces was the adoption of Senate Constitutional Amendment No. 17, filed with the Secretary of State of California on June 16, which submitted for popular ratification all amendments which had been placed in the California anti-alien land law since 1920.<sup>52</sup> By this device the way was opened to continue agitating the "Japanese menace" in the election of 1946.

From the evidence available, the conclusion that the 1943 and 1945 amendments to the Fish and Game Code of California were inextricably linked with anti-Japanese agitation of the period appears inescapable. To maintain that these amendments were isolated phenomena, traceable solely to a concern for the conservation of the state's resources, is, in the circumstances, untenable.

<sup>48</sup>323 U. S. 283.

<sup>49</sup>Stats. 1945, Chap. 1129, Sec. 1 and Sec. 3.

<sup>50</sup>*Ibid.*, Sec. 4.

<sup>51</sup>Stats. 1945, Chap. 1136, Sec. 1.

<sup>52</sup>Proposition 15 on the November 1946 election ballot.

## Ineligibility to Citizenship Is an Unreasonable Classification by Which to Deny Commercial Fishing Licenses.

The discretionary latitude permitted states to classify persons must not be an irrational discrimination even against aliens. The protection and guaranties of the Fourteenth Amendment are not limited to citizens but include aliens.<sup>53</sup>

The legislature must exercise a reasonable discretion. If its action is a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class, it will not pass the constitutional test.<sup>54</sup>

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. If no reason exists except hostility to the race and nationality, the discrimination is illegal. Consequently, such laws would be a denial of the equal protection of the law and a violation of the Fourteenth Amendment."<sup>55</sup>

The mere fact that the legislature has made a classification is not sufficient. There must be a reasonable ground—"some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection."<sup>56</sup>

<sup>53</sup>*Yick Wo v. Hopkins*, 118 U. S. 356; *Truax v. Raich*, 239 U. S. 33; *In re Tiburcio Parrott*, 1 Fed. 481; *In re Ah Chong*, 2 Fed. 733; *Ho Ah Kow v. Nunan*, 5 Sawy. 552; *Wong Wai v. Williamson*, 103 Fed. 1; *Fraser v. McConway & Farley Co.*, 82 Fed. 257; *Lem Moan Sing v. United States*, 158 U. S. 538.

<sup>54</sup>*Holden v. Hardy*, 169 U. S. 366, 398.

<sup>55</sup>*Yick Wo v. Hopkins*, 118 U. S. 256, 374.

<sup>56</sup>*Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 165.

Any legal restriction which entails the civil rights of a single racial group is immediately suspect. The courts must subject them to the most rigid scrutiny.<sup>57</sup>

The courts will look to the purpose of the statute. Whether the legislative enactment is reasonable or not will be determined from the natural effect of such statutes when put into operation. The proclaimed purpose itself is not the deciding factor.<sup>58</sup>

Form or mere pretense should be overruled. The substance of the thing must be the subject of inquiry. If a statute has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the courts to give effect to the Constitution.<sup>59</sup>

In considering the question of whether the denial of commercial fishing licenses to "aliens ineligible to citizenship" is a valid exercise of the discretionary power of the state legislature or not, the background of the agitation for the passage of such provision in the years gone by as well as the conditions of the times cannot be ignored. Certainly, when the classification is extended beyond "aliens" by dividing them into "eligible" and "ineligible" to citizenship, such restrictions which curtail the civil rights of a single racial group are immediately suspect. The courts must subject them to the most rigid scrutiny.<sup>60</sup>

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<sup>57</sup>*Korematsu v. United States*, 323 U. S. 214, 216.

<sup>58</sup>*Lockner v. New York*, 198 U. S. 45; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350; *Coppage v. Kansas*, 236 U. S. 1.

<sup>59</sup>*Mugler v. Kansas*, 123 U. S. 623.

<sup>60</sup>*Korematsu v. United States*, 323 U. S. 214, 216.



California and the few states which have anti-alien land laws, are the only ones which have gone to the extent of classifying aliens who are "eligible" and who are "ineligible" to citizenship, as far as can be ascertained. In all the others the basis has been citizens versus aliens.<sup>61</sup>

The justification urged for the validity of the amendment to Section 990 of the Fish and Game Code has been that it is a "conservation" measure. Whether such was the true motive or not need not be accepted for this court has stated recently:

"In approaching cases, such as this one, in which the federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in expressed terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."<sup>62</sup>

The history of the amendments made to Section 990 clearly establishes the fact that a rational basis for the classification is lacking. The 1943 amendment provided that "a commercial fishing license may be issued to any person other than alien Japanese." This provision could not have withstood the constitutional test against racial discrimination. Consequently, another amendment was proposed in the 1945 legislative session. And those who proposed such change stated:

"That there is danger of the present statute being declared unconstitutional, on the grounds of discrimi-

<sup>61</sup>Milton R. Konyitz, "The Alien and the Asiatic in American Law," Cornell University Press (1946), pp. 190-207.

<sup>62</sup>*Oyama v. California*, 68 S. Ct. 269.

nation since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship.

"The committee has introduced Senate Bill 413 to make this change in the statute."<sup>63</sup>

The then existing conditions verify the motive as frankly stated by the sponsors of the amendment.

There was no relation between "conservation" and the prohibition against Japanese in the first instance. The mass evacuation of all persons of Japanese ancestry from the West Coast had been effected by the end of October of 1942;<sup>64</sup> consequently there were no alien Japanese to do any fishing. Such being the case, the logical conclusion that could be drawn was that the hatred engendered by the war hysteria, the race prejudice long prevalent, and the desire to drive the alien Japanese from the fishing industry if and when they were permitted to return to their homes motivated the passage of the amendment.

In 1945, the alien Japanese were still largely living in the relocation centers. The real return to their pre-war residences had not started until a compulsory resettlement program had been imposed upon the evacuees by the War Relocation Authority in 1946.<sup>65</sup>

<sup>63</sup>Senate Fact-Finding Committee on Japanese Resettlement—Report May 1, 1945, Published by the Senate of California, pp. 5, 6.

<sup>64</sup>Lieutenant General DeWitt: *Final Report, Japanese Evacuation from the West Coast, 1942*; Government Printing Office, 1943, p. 280.

<sup>65</sup>U. S. Department of Interior, War Relocation Authority, *The Evacuated People*.

Since there were no alien Japanese fishermen to interfere with the alleged conservation measure, the only reason which can be attributed is that contained in the report of the Senate Fact-Finding Committee.<sup>66</sup> And what better source for the reasons of the Amendment can be had than from the sponsors of the bill?

If the measure had been prompted by the need for conservation, why was it necessary to impose a prohibition against a group of people who were then not residing within the state of California?

The claim of conservation overlooks the fact that many types and means for conservation had been devised and enforced by the State of California and passed even by the 1945 legislature.<sup>67</sup>

Districts for fishing, seasons, amount to be taken, sizes, grades, distinction between sporting and commercial fishing and so forth—all these provisions are true conservation measures, germane to the purpose.<sup>68</sup>

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<sup>66</sup>Senate Fact-Finding Committee on Japanese Resettlement—Report, May 1, 1945, Published by the Senate of California.

<sup>67</sup>Secs. 806.5, 807.5, Taking of clams; Sec. 811, Regulation pertaining to hard shell cockles; Secs. 842.5, 860, 875.5, 880, 881, 883, 887, etc., Use of nets; Sec. 954, Taking of crabs—Fish and Game Code.

<sup>68</sup>Fish and Game Codes: Secs. 60-118.5, Districts for Fish and Game; Secs. 610-631, Trout; Secs. 691-717, Bass; Sec. 792, Season for Abalone; Sec. 782, Season for Lobsters; Sec. 780, Taking of Shrimps; Secs. 840-959, Use of Nets for Various Fishes; Secs. 972-973, Use of Lines; Secs. 970-971, Use of Traps; Sec. 1110, Operation of Fishing Board; Sec. 1063, Establishment of Grades; Sec. 1066, Sardine Reduction Limit.

Furthermore, according to the census of 1940, there were only 853 aliens besides the Japanese who were still "ineligible to citizenship" residing in the continental United States.<sup>60</sup> The extent conservation can be effected by permitting all the residents of California numbering into the millions commercial fishing license and prohibiting only a few "aliens ineligible to citizenship" creates an immediate suspicion. The so-called conservation measure does not prohibit even non-residents from obtaining licenses. In other words, any person, excepting an "ineligible" is permitted to fish. The mathematics involved make it most obvious that the claim of the state is a sham and excuse, concocted subsequently to uphold and justify a racial discrimination.

The various provisions of the Fish and Game Code provide the measures to protect and conserve all types of fish. Even a casual comparison of the various conservation measures heretofore adopted makes it apparent that there is no rational or even a superficial relationship to the purpose and object for which commercial licenses were denied to a group who were then not living within the state of California and who were then unable to do any fishing even if they were residents because of the state of war with Japan and the regulations imposed by the armed forces.<sup>61</sup>

<sup>60</sup> 16th Census of the U. S., 1940.

<sup>61</sup> Thirty-eighth Biennial Report, Bureau of Marine Fisheries of California.



## Change in Conditions Make the Classification of Ineligibility to Citizenship Unconstitutional.

World War II has witnessed interesting developments in the attitude and conducts of aliens in relation to their mother country and the land of their adoption, the United States. The fears and doubts pertaining to loyalty and national safety have been found to be without foundation. The concurring opinion of Justice Murphy in the recent decision of *Oyama v. California* discusses this matter in detail.<sup>70</sup>

The case of *Terrace v. Thompson*<sup>71</sup> first upheld the validity of this special classification based on "ineligibility to citizenship" and has become the precedent for subsequent decisions. The knowledge of the facts and the conditions existing were as of 1923. A quarter of a century has elapsed. And many changes have taken place.

The number of aliens racially ineligible to citizenship residing in the continental United States in 1920 was estimated around 134,135—alien Chinese, American Indians and Hindus were included.<sup>72</sup>

Since 1942, great progress has been made in conforming to the American way of life, to judge an individual on his own merits and not to generalize on a group or race

<sup>70</sup>68 S. Ct. 269.

<sup>71</sup>263 U. S. 197.

<sup>72</sup>McGovney, *Anti-Japanese Land Laws* (1947), 35 California L. Rev., No. 1, p. 11.

basis<sup>73</sup>. There are in the whole of continental United States approximately 48,158 aliens racially ineligible to citizenship today. Of this number, 47,305 are alien Japanese; 749 Koreans and the remainder Polynesians and other Asiatics.<sup>74</sup> When the case of *Terrace v. Thompson* was decided in 1923,<sup>75</sup> there were about 134,135 who were ineligible to citizenship.

The changing naturalization laws point out the unsoundness of "ineligibility to citizenship" to be used in any type of conservation legislation.<sup>76</sup>

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<sup>73</sup>The naturalization law itself has been greatly broadened so that today it reads:

"The right to become a naturalized citizen . . . shall extend only to—

(1) white persons, persons of African nativity or descent, and persons who are descendants of races indigenous to the continents of North and South American or adjacent islands and Filipino persons or persons of Filipino descent;

(2) persons who possess, either singly or in combination, a preponderance of blood of one or more of the classes specified in clause (1);

(3) Chinese persons and persons of Chinese descent, and persons of races indigenous to India; and

(4) persons who possess, either singly or in combination a preponderance of blood of one or more of the classes specified in clause (3) or, either singly or in combination, as much as one-half blood of those classes and some additional blood of one of the classes specified in clause (1)."

8 U. S. C. (1940), Sec. 703, as last amended by Pub. L. No. 483, 79th Congress, 2d Sess. (July 2, 1946).

<sup>74</sup>*16th Census of the United States: 1940, Characteristics of the Nonwhite Population*, p. 2.

<sup>75</sup>263 U. S. 225.

<sup>76</sup>In the footnote of *Oyama v. California*, 68 S. Ct. 269, Chief Justice had the following:

"At the time the Alien Land Law was adopted the right to be naturalized extended only to free white persons and persons of

This means that as of today, when "aliens ineligible to citizenship" are classified, it could mean only the Japanese in actual effect. This is especially true with the State of California where there is the largest percentage of Japanese of all the states of the Union.

Just as the Constitution is not static, so must the decisions of the Court keep pace with the changing times and conditions. Justice Brandeis stated:

"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in conditions to which it is applied."<sup>77</sup>

The history of our naturalization laws is a history of race legislation. Therefore, excepting for the claimed plenary powers of Congress, they would have been ruled unconstitutional. When the first law was passed in 1790, it provided that only "free, white persons" shall be eligible to citizenship. Changes were made from time to time.<sup>78</sup>

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African nativity or descent. In 1940, descendants of races indigenous to the Western Hemisphere were also made eligible, 54 Sta. 1140; in 1943 Chinese were made eligible, 57 Sta. 601; and in 1946 Filipinos and persons of races indigenous to India were made eligible, 60 Sta. 416; 8 U. S. C. A., Sec. 703 (1946 Supp.)

It seems to be accepted that Japanese are among the few groups not eligible to citizenship."

<sup>77</sup>*Nashville C. & St. L. R. Co. v. Waters*, 294 U. S. 405, 415.

<sup>78</sup>American citizenship or eligibility to naturalization has been extended by Congress to include:

1790—Free white persons.

1870—Persons of African nativity or descent.

1900—Inhabitants of Hawaii.

1917—Inhabitants of Puerto Rico.

1924—American Indians.

1927—Inhabitants of the Virgin Islands.

1940—Races indigenous to North or South America

1943—Chinese.

1946—Filipinos and natives of India.

"In Our House But Not Of It"—Committee for Equality in Naturalization, Washington, D. C.

Following the enactment of the 14th Amendment, the basis for eligibility to citizenship has been gradually broadened so as to include all persons of African nativity, natives indigenous to the Western Hemisphere; and during World War II, the barriers were relaxed for Asiatics for the first time.<sup>79</sup>

Can any state adopt a race standard set up by Congress for its own use? Justice Murphy stated in this connection:

" . . . Yet it does not follow, even if we assume that Congress was justified in adopting such racial distinctions that California can blindly adopt those distinctions for the purpose of determining who may own and enjoy agricultural land. What may be reasonable and constitutional for Congress for one purpose may not be reasonable or constitutional for a state legislature for another and wholly distinct purpose. Otherwise there would be few practical limitations to the power of a state to discriminate among those within its jurisdiction, there being a plethora of federal classifications which could be copied.

"In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction was taken from a federal statute or that the distinction may be rationalized for the purpose for which Congress used it. *The state's use of the distinction must stand or fall on its own merits.*" And if it appears that the equal protection clause forbids the state from using the distinction

<sup>79</sup>8 U. S. C. (1940), Sec. 703, as last amended by Pub. L. No. 483, 79th Congress, 2d Sess. (July 2, 1946).



for the desired purpose, the fact that Congress is free to adopt distinction in some other connection gives the state no additional power to act upon it. Thus the state acquires no power whatever to impose racial discriminations upon resident aliens from the Congressional power to exclude some or all aliens on a racial basis." (*Italics ours.*)<sup>80</sup>

The various government agencies have helped to prove that loyalty is not a matter of race. The United States Army demolished all fears about the dangers of an alien as compared to a citizen by utilizing the manpower of the alien enemy Japanese at the munition dumps of Utah and Nebraska while the war with Japan was at its height. The maps that the air force and other branches of the armed forces used, in their invasion of Japan were prepared by the Army Map Service with headquarters in Cleveland, Ohio, with alien Japanese as valuable staff members because of their familiarity with the geography and topography of Japan. The Army and Navy intelligence schools availed themselves of the special knowledge of the Japanese language by the alien Japanese. The Office of War Information and the Office of Strategic Services and numerous other top priority agencies could not have functioned efficiently and effectively without the aid of the alien Japanese. The food production and defense plants were materially aided through the labors of these aliens.<sup>80a</sup>

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<sup>80</sup>Concurring Opinion in *Oyama v. California*, 68 S. Ct. 269.

<sup>80a</sup>"They Work For Victory," published by the Japanese American Citizens League, 1945.

**Limitation of Occupational Opportunities Based on Eligibility to Citizenship Violates the Equal Protection of the Laws and Due Process Clauses of the Fourteenth Amendment.**

The basic concept of the equal protection and due process clauses of the Fourteenth Amendment is that the Amendment "was designed to bar the States from denying to some group, on account of their race or color, any rights, privileges, and opportunities accorded to other groups."<sup>81</sup> The protection applies to all persons within the territorial jurisdiction, without regard to differences of race, creed, color or nationality."<sup>82</sup>

"The equality guaranteed is equality under the same conditions, and among persons similarly situated. However, the Legislature may make a reasonable classification of persons and businesses and pass special legislation applying to certain classes. The rule is that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished."<sup>83</sup>

The petitioner herein is an alien Japanese who is a resident of the State of California. As such, he is "entitled to the same protection under the laws" that a citizen is entitled to. He owes obedience to the laws of the country

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<sup>81</sup>Concurring opinion of Justice Murphy, *Oyama v. California*, 68 S. Ct. 269.

<sup>82</sup>*Truax v. Raich*, 239 U. S. 33; *Yick Wo v. Hopkins*, 118 U. S. 356.

<sup>83</sup>*Takahashi v. California*, 30 Calif. Advance Reports 723, 731, and cases cited.

to which he is domiciled, and; as a consequence, he is entitled to the equal protection of those laws.<sup>84</sup>

The question is as to the extent the state legislature can go in the exercise of its powers to deny a person from earning a livelihood. There are constitutional limitations against racial discrimination which must be overcome.

Despite the powers the state legislature may have over its own wild game and fish within its jurisdiction, the status necessarily changes when permission is given to operate an industry: In this instance, the State of California has made a distinction between sporting and commercial fishing.<sup>85</sup>

Those who are engaged in fishing for profit are required to obtain commercial fishing licenses; and those whose fishing is not for profit are required to obtain sporting licenses. In other words, the state no longer can claim the usual power it has over its own fish. If it has permitted an industry to be developed, then the restrictions it places upon the occupation and labor involved will come under the rulings of *Truax v. Raich*.<sup>86</sup>

"It requires no argument to show that the right to work for a living in the common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the

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<sup>84</sup>*Wong Wing v. United States*, 163 U. S. 228, 242.

<sup>85</sup>Fish and Game Code, Sections 420 and 990.

<sup>86</sup>*Truax v. Raich*, 239 U. S. 33.

equal protection of the laws would be a barren form of words. <sup>87</sup>

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission would be segregated in such of the States as chose to offer hospitality, <sup>88</sup>

9344 persons had obtained licenses for commercial fishing during the year 1941-42. Out of this number 699 were alien Japanese. In 1943-44, the number was 11,747.<sup>89</sup>

The number who earn their livelihood from this industry unquestionably makes it one of the common occupations of the communities of the four ports where fishing was centralized. Therefore, to deny anyone on the flimsy grounds of "ineligibility to citizenship" is a denial of the equal protection and due process of the laws.

In order to justify the position of the state, the majority opinion of the California Supreme Court stated as follows:

"Obviously, if the Legislature determines that some reduction in the number of persons eligible to hunt

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<sup>87</sup>*Ibid.* p. 41.

<sup>88</sup>*Ibid.* p. 42.

<sup>89</sup>California Fish Bulletin No. 59, pp. 24-25; Thirty Eighth Biennial Report, p. 35; Thirty-Ninth Biennial Report, p. 103.



and fish is desirable, it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so. This is a logical, established, and reasonable method of classifying for conservation purposes, and the existence of facts supporting the legislative judgment is presumed. . . .<sup>90</sup>

The fact that the alien land law decisions approved the classification of "ineligible to citizenship" is not binding in every instance. There must be a substantial relation to the legitimate object to be accomplished. And such classification has not been the established method as far as California has been concerned for conservation purposes.<sup>90a</sup>

Furthermore, a common occupation is involved in this case. Would the court have approved a provision which would have stated that "aliens ineligible to citizenship" cannot work on farm lands because the ownership is prohibited? California dares not go to this extent.

"We are told, however, that, despite the sweeping prohibition against Japanese ownership or occupancy, it is no violation of the law for a Japanese to work on land as a hired hand for American citizens or for foreign nationals permitted to own California lands. And a Japanese man or woman may also use or occupy land if acting only in the capacity of a servant. . . ."<sup>91</sup>

Various types of professions are restricted to citizens. But does that necessarily follow that everyone assisting must be a citizen? Can the state legislature dictate to the

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<sup>90</sup>*Takahashi v. California*, 30 Calif. Advance Reports 723.

<sup>90a</sup>See footnote 62.<sup>4</sup>

<sup>91</sup>*Oyama v. California*, 68 S. Ct. 269.

effect that the law clerks and stenographers must be citizens simply because it requires citizenship to become a member of the bar?<sup>91a</sup> The answer is obvious. Any law that restricts the earning of a livelihood to this extent is unconstitutional.

As to whether California laws of this nature are intended to single out the alien Japanese needs little argument. Justice Black stated in the recent decision, *Oyama v. California*:

"The California law in actual effect singles out aliens of Japanese ancestry, . . . . This is true although the statute does not name the Japanese as such, and although its terms also apply to a comparatively small number of aliens from other countries. That the effect and purpose of the law is to discriminate against Japanese because they are Japanese is too plain to call for more than a statement of that well-known fact."<sup>92</sup>

Justice Murphy stated in the same case:

"It is true that the Alien Land Law, in its original and amended form, fails to mention Japanese aliens by name. Some of the proposals preceding the adoption of the original measures in 1913 had in fact made specific reference to Japanese aliens. But the expansion of the discrimination to include all aliens ineligible for citizenship did not indicate any retreat from the avowed anti-Japanese purpose."

Chief Justice Vinson stated in *Oyama v. California*, that "it seems to be accepted that Japanese are among the few groups not eligible for citizenship."<sup>93</sup>

<sup>91a</sup>California Business and Professions Code, Sec. 6060.

<sup>92</sup>*Oyama v. California*, 68 S. Ct. 269, concurring opinion of Justice Black.

<sup>93</sup>*Ibid.*, footnote on p. 269.

The trial court in this case found:

"As it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California, and as the Court must take judicial notice of the same fact, it becomes manifest that in enacting the present version of Section 990, the Legislature intended thereby to eliminate Japanese from those entitled to a commercial fishing license by means of description rather than by name. *To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent.*" (Italics ours.)

The trial court further stated:

" . . . this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. . . This discrimination, patently hostile, is not based upon a reasonable ground or classification, and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, wherein and whereby a state is forbidden to deny to any person within its jurisdiction the equal protection of the laws. . . ."<sup>94</sup>

The minority opinion of the California Supreme Court in this case, stated:

"Finally, highly persuasive arguments may be made that the law in the instant case is aimed solely at Japanese in an obvious discrimination against a

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<sup>94</sup>R. 17-18.

particular race, in spite of the fact that that race is not mentioned by name in the statute, by reason of the historical background of alien legislation and court decisions. . . .<sup>95</sup>

As far as California laws are concerned, it is generally accepted that "ineligible to citizenship" was intended to single out the alien Japanese. The legislative history of the fishing bills in the state legislature makes this obvious.

Furthermore, the entire record of the 1943 and 1945 legislative sessions of the State of California establish beyond a shadow of a doubt that hatred against persons of Japanese ancestry had permeated the atmosphere to such an extent that the wonder is the legislators restrained themselves to what they did.<sup>95a</sup> The sessions of 1947 and

<sup>95</sup>*Takahashi v. California*, 30 Calif. Advance Reports 723.

<sup>95a</sup>The California legislative session of 1943 showed its true colors through the resolutions and laws passed:

1. Affidavit of "aliens ineligible to citizenship" not acceptable in applications for registering of previously unregistered births. Thus even parents were precluded from aiding their children to establish their birth.

Stats. 1943, Chap. 13, pp. 121-22;

Sections 10615-16, Health and Safety Code.

2. Senate Joint Resolution No. 21 memorialized "Congress to release implements and commodities stored for Japanese evacuees to the civilian population for use during this time of war . . . ."

Stats. 1943, Chap. 114, pp. 3341-42.

3. Senate Joint Resolution No. 3 memorialized Congress to forfeit citizenship of those holding dual citizenship.

Stats. 1943, Chap. 113, pp. 3340-41.

4. Amendment to the hunting license:

that no such license shall be issued to an alien Japanese."

Section 427, Fish and Game Code;

Stats. 1943, Chap. 1100, pp. 3039-40.

5. Amendment to the sporting fishing license.

that no such license shall be issued to an alien Japanese."

Section 428, Fish and Game Code;

Stats. 1943, Chap. 1100, p. 3040.



1948 shows a marked contrast and a change for the better in that the appropriation bill of \$65,000 for the escheat

6. Amendment to commercial fishing license:  
 "that no such license shall be issued to an alien Japanese."  
 Section 990, Fish and Game Code;  
 Stats. 1943, Chap. 1100, p. 3040.
7. Several amendments to the Alien Land Law were enacted:
  - a. Appointment of alien as guardian  
 Stats. 1943, Chap. 1059, Secs. 1 and 2.
  - b. Sale or operation of escheated reality.  
 Stats. 1943, Chap. 1003, Sec. 1.
  - c. Escheat of leasehold or other interest in reality: Stock or interest in company.  
 Stats. 1943, Chap. 1059, Sec. 3.
  - d. Punishment for violations.  
 Stats. 1943, Chap. 1059, Sec. 4.
  - e. Injunction proceedings.  
 Stats. 1943, Chap. 1059, Sec. 4 (5).
  - f. Declaratory proceedings.  
 Stats. 1943, Chap. 1059, Sec. 6.
  - g. Leases, etc., in name of wife, child or other person.  
 Stats. 1943, Chap. 1059, Sec. 7.
  - h. Evidence.  
 Stats. 1943, Chap. 1059, Sec. 8.

Since the war was still on against Japan, the 1945 legislative session continued to enact anti-Japanese laws and pass unfavorable resolutions:

1. Senate Joint Resolution No. 9:  
 To memorialize Congress to deport the Japanese nationals and certain persons of Japanese descent.  
 Stats. 1945, Chap. 36, p. 101.
2. Senate Joint Resolution No. 5:  
 Substitution of United States Army for War Relocation authority in the Administration of Tule Lake Japanese Center and other internment camps.  
 Stats. 1945, Chap. 19, p. 83.
3. Appropriation of \$200,000 for investigation and prosecution of escheat cases.  
 Stats. 1945, Chap. 1458, p. 2739.
4. Amendment to Section 427 of the Fish and Game Code, Class A hunting license:  
 "no such license shall be issued to a person ineligible to citizenship."  
 Stats. 1945, Chap. 1100, Sec. 1, p. 3039.
5. Amendment to Section 427 of the Fish and Game Code, Class B sporting fishing license:

proceedings was the only unfavorable measure passed in 1947 and there was nothing in the 1948 session.

"no such license shall be issued to a person ineligible to citizenship."

6. Amendment to Section 990 of the Fish and Game Code, commercial fishing license:

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship."

Stats. 1945, Chap. 191, Sec. 3.

7. Assembly Joint Resolution No. 13 relative to exchange of United States and Japanese nationals, heartily commending the U. S. State Department and urging it to continue the efforts so that every American held by the Japanese Government be returned to the United States

Stats. 1945, Chap. 25, p. 2948.

8. Senate Constitutional Amendment No. 17, to incorporate the initiative Alien Land Law and subsequent amendments as part of Section 17, Article I, of the State Constitution.

Stats. 1945, Chap. 139, p. 3147.

9. Amendments to the Alien Land Law:

a. Escheat of property acquired in fee.

Stats. 1945, Chap. 1129, Sec. 1.

b. Sale or operation of escheated realty.

Stats. 1945, Chap. 1129, Sec. 2.

c. Escheat of leasehold or other interest in realty.

Stats. 1945, Chap. 1129, Sec. 3.

d. No statute of limitations.

Stats. 1945, Chap. 1136, Sec. 1.

e. Conveyance to prevent escheat.

Stats. 1945, Chap. 1129, Sec. 4.

The 1947 Legislature had Senate Bills 666, appropriating \$65,000 for the Attorney General to enforce the Alien Land Law, and 1453, to appropriate \$200,000 for the same purpose.

Bill 1453 was not acted upon. However, the \$65,000 was passed by the bare hard-fought vote margin of five (5) in the Assembly.

It passed amendments to Sections 427 and 428 of the Fish and Game Code, permitting "aliens ineligible to citizenship" to obtain sport fishing and hunting licenses on equal basis with all aliens.

The 1948 budget session of the Legislature did not pass any bill pertaining to persons of Japanese ancestry. (Pacific Citizen, April 3, 1948.)

The foregoing account of laws enacted by the two wartime legislative sessions of California supplements the already abundant evidence that "ineligible to citizenship" was singling out the alien Japanese in fact.

The reports of the legislative committees throw additional interesting lights. The Joint Fact-Finding Committee Investigating Un-American Activities in California filed its findings of two years investigations throughout the state on June 13, 1945. It stated:

"In conclusion on the Japanese problem, your committee, in view of the foregoing representative opinions and recitations of official facts, reaffirm its position that: It is dangerous to the public safety, and to the safety of the Japanese aliens, and those of American birth, to return them to this vital defense area during the war with Japan."<sup>95b</sup>

A similar report was filed with the Senate.

The Senate Fact-Finding Committee on Japanese Resettlement had the following conclusion:

"This committee is vigorously opposed to the return of any Japanese to California until after the end of the war with Japan."<sup>95c</sup>

In 1880, when the anti-Chinese feeling was at its height, the California legislature passed an act which provided:

"All aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell."<sup>96</sup>

<sup>95b</sup> Assembly Journal, Vol. 2, 56th Session, pp. 4126-46.

<sup>95c</sup> Senate Journal, Vol. 2, 56th Session, p. 2323.

<sup>96</sup> *In re Ah Chong*, 2 Fed. 733, 734.

Although the wording is different, the effect is the same as the present Section 990 of the Fish and Game Code. And there, the federal circuit court held:

"It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, *considered in connection with the public history of the times*, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. . . ." (Italics ours.)

"The act is clearly unconstitutional. . . ."97

What the state cannot do directly, it should not be permitted to do indirectly. All anti-Japanese legislations of California have been intended to deprive the opportunities to earn a livelihood for those alien Japanese already residing within the state and to discourage others from coming within the state.

A clear enunciation by this Court as to the rights of alien Japanese who are residents of California under the Fourteenth Amendment will be timely.

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<sup>97</sup>*Ibid.*, 737.



### Conclusion.

A halt must be called to the broadening of the classification permitted in discriminating persons residing within this country. A wedge made here and there has curtailed the opportunities of the aliens to earn a livelihood. More and more, the significance of the protection of the Fourteenth Amendment is being minimized.

Under one pretense or another, opportunities to work and earn a livelihood are being denied. The extremes may be noted when citizenship is made a requisite for becoming a chauffeur, manicurist, masseur, watchman, embalmer, barber, private detective, plumber, and numerous other vocations.<sup>98</sup>

To bar aliens who are residents of the state is already carrying the classification to the brink of a violation of constitutional rights. A distinction based on "ineligibility to citizenship" certainly should not be tolerated. There is no other conclusion than that it is race discrimination.

The classification in the federal naturalization laws is based on race. Therefore, it is not a reasonable or rational standard for the states to adopt in other matters, especially in matters pertaining to earning a livelihood.

Accordingly Section 990 of the California Fish and Game Code denies to the petitioner his rights afforded by

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<sup>98</sup>Konvitz, "The Alien and the Asiatic in American Law," pp. 210-11.

the equal protection and due process clauses of the Fourteenth Amendment.

The judgment should be reversed.

Respectfully submitted,

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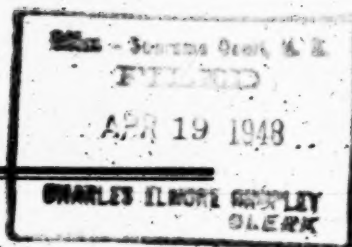
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FILE COPY



IN THE

**Supreme Court of the United States**

October Term, 1947

No. 538

TORAO TAKAHASHI,

*Petitioner,*

—vs.—

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as members thereof.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

**BRIEF FOR AMICI CURIAE**

HOME MISSIONS COUNCIL OF NORTH AMERICA,

COUNCIL FOR SOCIAL ACTION AND COMMITTEE  
ON CHURCH AND RACE, CONGREGATIONAL  
CHRISTIAN CHURCHES,

COUNCIL ON CHRISTIAN SOCIAL PROGRESS,  
NORTHERN BAPTIST CONVENTION,

HUMAN RELATIONS COMMISSION, THE PROTES-  
TANT COUNCIL OF THE CITY OF NEW YORK,

*Amici Curiae.*

EDWARD J. ENNIS,

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IN THE

**Supreme Court of the United States**

October Term, 1947

No. 533

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TORAO TAKAHASHI,

*Petitioner,*

—VS.—

FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM SILVA, as members thereof.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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**BRIEF FOR HOME MISSIONS COUNCIL OF NORTH AMERICA, COUNCIL FOR SOCIAL ACTION AND COMMITTEE ON CHURCH AND RACE, CONGREGATIONAL CHRISTIAN CHURCHES, COUNCIL ON SOCIAL CHRISTIAN PROGRESS, NORTHERN BAPTIST CONVENTION, HUMAN RELATIONS COMMISSION, THE PROTESTANT COUNCIL OF THE CITY OF NEW YORK, *Amici Curiae.***

The above named associated Protestant organizations, as *amici curiae*, file this brief pursuant to the Court's Rule XXVII(9) and upon the written consent of the parties. The major Protestant denominations in the United States and leading Protestant agencies dealing with Christian responsibility toward social, economic, and race relations, are members of these organizations. These organizations recog-



size as one responsibility of the Church the elimination of racial discrimination in pursuit of a livelihood and they are devoted to achieving the practical discharge of that responsibility in every appropriate manner. This brief is filed to urge the Court to denounce as unconstitutional the statutory racial discrimination here involved.

### Facts

The essential facts, more fully set forth in the brief for petitioner, are that the petitioner, born in Japan and a resident of Los Angeles, California since 1907, has been engaged in the occupation of commercial fishing off the coast of California since 1915. The petitioner annually received a commercial fishing license until he was refused a license under the 1945 amendment of Section 990 of the Fish and Game Code of California which provides that "a commercial fishing license may be issued to any person other than a person ineligible to citizenship". The Supreme Court of California, three of the seven Justices dissenting, reversed the Superior Court and upheld the statute denying the petitioner the right to a license to pursue the work of commercial fisherman which he had pursued since 1915.

## ARGUMENT

The California statute on its face and as applied deprives the petitioner of liberty and property without due process of law and denies him the equal protection of the laws in violation of the Fourteenth Amendment.

It is a basic tenet of our society that the human right to work to earn a livelihood is, in the words of the Declaration of Independence, one of the inalienable rights with which man is endowed by his Creator and to secure these rights—not to grant them—governments are instituted among men. Judicial authority has expressly recognized this principle. *Slaughter-House Cases*, 16 Wall. 36, 105, 116, 127; *Case of the Monopolies*, 11 Coke Rep. 85, 86b-87a, 77 Eng. Rep. 1260, 1263.

This principle has also been repeatedly expressed as a tenet of Christian doctrine. Recently this principle was expressed as follows:

"The right to work, we believe, is a divine right. It is not an isolated right. It embodies a moral principle which cuts across the whole of life. Because of this it is clearly related to family life. The economic basis of family life is a major factor in enabling the family to find its full expression in relationship to other families which go to make up society. Therefore, the right to work is important not only to the individual but to the family and is necessarily basic to society as a whole. In this basic relationship there is a moral principle involved. It may briefly be summarized as the right of

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every individual to work without discrimination because of race, creed, or national origin."<sup>1</sup>

"The right and opportunity for any worker to be employed without discrimination on account of race, color, creed, or national origin are so just and so in harmony with Christian ethics that all Christians and church agencies have a deep responsibility to stand for that clear Christian and democratic principle."<sup>2</sup>

The historic emancipation of the Negro minority in the United States was the primary reason for the adoption of the Fourteenth Amendment but since the meaning of this constitutional provision was first propounded in the *Slaughter-House Cases*, *supra*, it has been expressly recognized, in that case and subsequently, that the direct purpose of this Amendment was to secure due process of law and the protection of equal laws for all racial and national minorities particularly in their rights to seek their livelihood without discrimination based on race or national origin. *Slaughter-House Cases*, *supra*, at pp. 72, 81; *Butchers Union v. Crescent City Co.*, 111 U. S. 746, 757 (Field, J., concurring); p. 765 (Bradley, J., concurring); *Yick Wo v. Hopkins*, 118 U. S. 356, 369-370; *Truax v. Raich*, 239 U. S. 33, 41. In the *Truax* case the Court stated the settled principle as follows:

1. Statement of Dr. Beverley M. Boyd, Executive Secretary of the Department of Christian Social Relations, Federal Council of the Churches of Christ in America (comprising twenty-five Protestant denominations) before the subcommittee of the Senate Committee on Labor and Public Welfare on Antidiscrimination in Employment (Hearings on S.984, 80th Cong., 1st Sess., p. 83).
2. Resolution of the Executive Committee of the Home Missions Council of North America adopted in 1944 (Hearings on S.984, 80th Cong., 1st Sess., p. 84).

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

Even if the plain language of the Amendment and these authorities did not make it clear that the California statute here involved is unconstitutional such a result would follow from a consideration of the historical background of the Amendment. It cannot be doubted that the Christian insistence upon the ethical and religious concept of the equality and brotherhood of man was one basic reason for the emancipation of the Negro minority and the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments. This is evident not only from the active part played by prominent Christian religious leaders in working for emancipation, but also from the very spirit and text of President Lincoln's Emancipation Proclamation.

This basic purpose of the Fourteenth Amendment, to protect men from racial discrimination, requires that it again be applied to prevent the State of California from again violating the principle of the brotherhood of man by discriminations based on race.<sup>3</sup>

<sup>3</sup> Federal laws in appropriate cases are construed to conform to basic religious principles which are a part of the law of the land. *Bector, etc. of Holy Trinity Church v. United States*, 143 U. S. 457; *Vidal, et al. v. Girard's Executors*, 2 How. 127, 198.



## CONCLUSION

Wherefore it is respectfully prayed that the decision of the court below be reversed.

Respectfully submitted,

HOME MISSIONS COUNCIL OF NORTH AMERICA,  
COUNCIL FOR SOCIAL ACTION AND COMMITTEE  
ON CHURCH AND RACE, CONGREGATIONAL  
CHRISTIAN CHURCHES,

COUNCIL ON CHRISTIAN SOCIAL PROGRESS,  
NORTHERN BAPTIST CONVENTION,

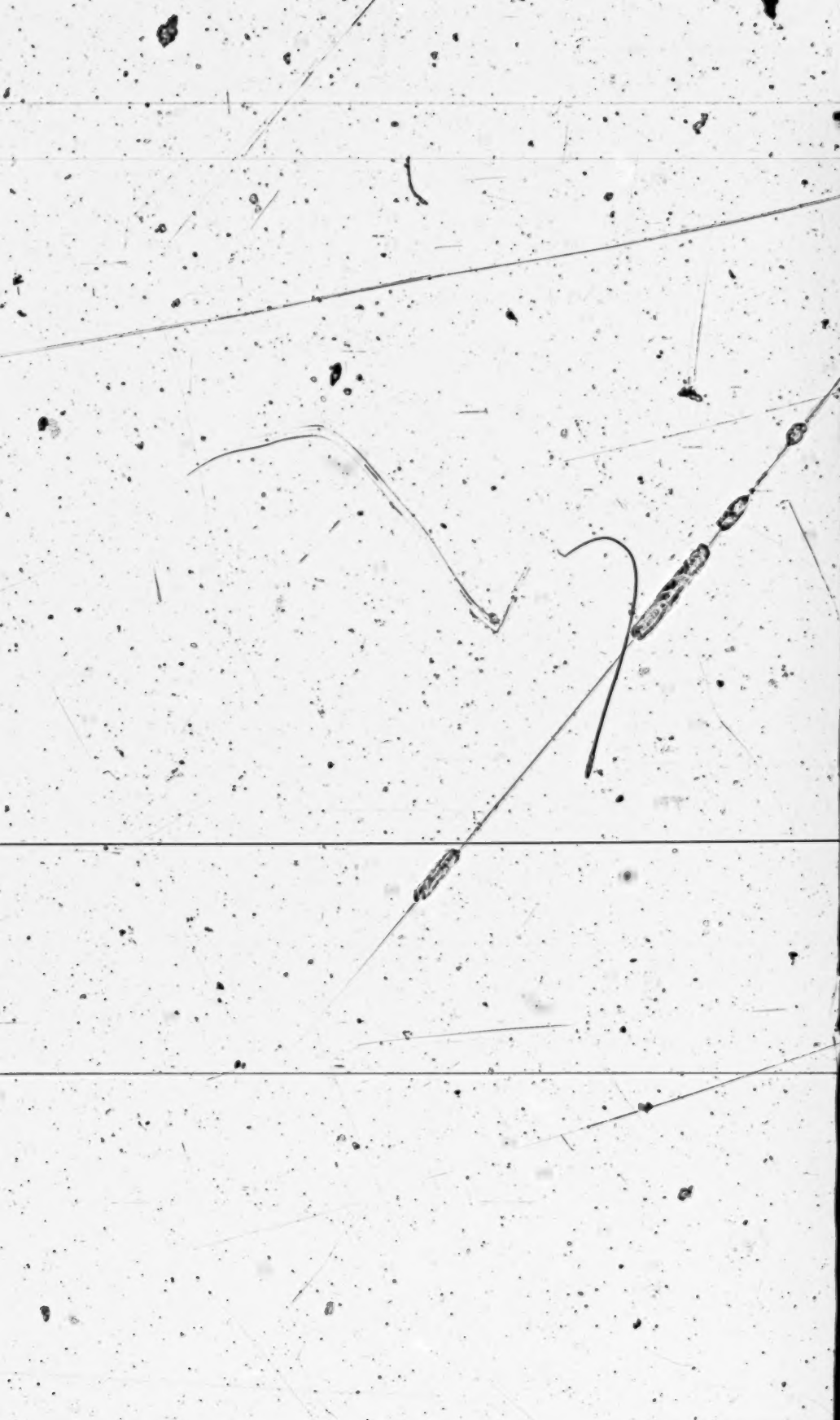
HUMAN RELATIONS COMMISSION, THE PROTESTANT  
COUNCIL OF THE CITY OF NEW YORK,

*Amici Curiae.*

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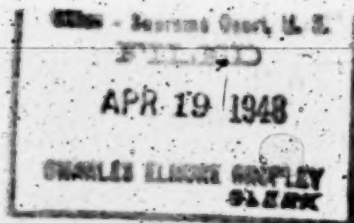
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FILE COPY

No. 533



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1947

TORAO TAKAHASHI, *Petitioner,*

v.

FISH AND GAME COMMISSION, LEE F. PAYNE,  
as Chairman Thereof, et al.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF CALIFORNIA

**BRIEF FOR THE AMERICAN JEWISH CONGRESS  
AS AMICUS CURIAE**

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April 16, 1948.





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# Supreme Court of the United States

No. 533—October Term, 1947

TORAO TAKAHASHI, *Petitioner*,

v.

FISH AND GAME COMMISSION, LEE F. PAYNE,  
as Chairman Thereof, et al.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF CALIFORNIA

## BRIEF FOR THE AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

With the consent of the parties, the American Jewish Congress respectfully submits this brief, *amicus curiae*, in support of the petitioner's position in this case.

The American Jewish Congress is an organization composed of American Jews, organized in part " . . . to help secure and maintain equality of opportunity . . . and to safeguard the civil, political, economic and religious rights of Jews everywhere" and " . . . to help preserve, maintain and extend the democratic way of life."

The activities of the American Jewish Congress have never been confined to the interests of the Jewish people alone. It believes that Jewish interests are inseparable from those of justice and that Jewish interests are threatened whenever persecution, discrimination or humiliation is inflicted upon any human being because of his race or religion. The special interest of the Jewish people in human rights derives primarily from an immemorial

tradition which from the beginning has proclaimed the common origin and destiny of all mankind and has affirmed under the highest sanctions of faith and human aspiration the common and inalienable rights of all men. The struggle for human freedom is part of the substance of the Jewish tradition.

The denial by the State of California of a fishing license to a resident of the State solely because of his Japanese birth is a manifestation of racism which we consider incompatible with democratic institutions. We propose to show why we think it a violation of the equal protection clause of the Fourteenth Amendment.

### Question Presented

The sole question discussed in this brief is whether Section 990 of the Fish and Game Code of California deprives petitioner of the equal protection of the laws, in violation of the Fourteenth Amendment, by its provision that "A commercial fishing license may be issued to any person other than a person ineligible to citizenship."

We believe that this provision is invalid for the further reason that it violates Federal policy, especially as embodied in the United Nations Charter (Articles 55c, 56; 59 Stat. 1046). The fundamental issue of the impact of this policy upon state discriminatory practices has been presented to this Court in the pending cases involving the enforceability of restrictive covenants. *J. D. Shelley v. Louis Kraemer*, Oct. Term, 1947, No. 72; also Nos. 87, 290 and 291. The relevance of that issue here is clear. See concurring opinions of Justices Black and Murphy in *Oyama v. California*, 92 L. Ed. 257, 266, 278. However, we will not dwell further on that subject, as we believe that the equal protection clause alone requires reversal of the present judgment.

### Statement

Petitioner filed a petition in the Superior Court of the State of California for Los Angeles County for a writ of mandamus ordering the respondents, members of the Fish and Game Commission of the State, to issue to him a commercial fishing license. The petition alleged that petitioner was born in Japan; that he is, and since 1907 has been, a resident of Los Angeles and of the United States; that he is a commercial fisherman and has engaged in that occupation in California since 1915; that a commercial fishing license had been issued to him annually from that date until 1941; that he had been evacuated from California in 1942, but returned in 1945 to resume his former occupation; that he had qualified to obtain a commercial fishing license under the statute in every respect, except only that he is an alien of Japanese descent; and that he has no other occupation and has been unable to secure other employment (R. 1-2).

The petition further alleged that respondents refuse to issue a license to petitioner solely because of his Japanese ancestry and because of the provisions of Section 990 of the Fish and Game Code. It challenged the constitutionality of that section under the California Constitution and under the due process and equal protection clauses of the Fourteenth Amendment (R. 2).

Respondents filed an answer containing a demurrer, a denial that the license had been refused because of petitioner's Japanese ancestry, and an allegation that petitioner is not qualified for a license because he is a person ineligible to citizenship (R. 3-4).

The case was heard on the pleadings. The Superior Court filed an opinion (R. 11-18), in which it held the statute unconstitutional insofar as it denied to aliens ineligible to citizenship the right to fish upon the high seas for profit and to bring the catch to the California shore for sale. It ordered the issuance of a writ commanding



respondents to issue to petitioner a commercial fishing license "authorizing him to bring ashore in California, for the purpose of selling the same in a fresh state, his catches of fish from the waters of the high seas beyond the State's territorial jurisdiction" (R. 7).

After the respondents appealed to the Supreme Court of the State, the Superior Court amended the judgment by removing the limitation to fish caught beyond the territorial jurisdiction of the State and ordered the issuance of a peremptory writ commanding the issuance to petitioner of a commercial fishing license under Section 990 (R. 21, 22).

In the State Supreme Court both parties sought a decision on the merits of the amended judgment and the Court (although it declared that judgment void because filed after the appeal had been perfected) considered the appeal from it as a "special order made after final judgment" (R. 33-34). It upheld the constitutionality of the statute as applied both to fish caught within the territorial waters of the State and to those brought to the shore from the high seas (R. 30-45). Three of the seven justices dissented (R. 45-53).

### The Opinions Below

The Superior Court found in the statute an unconstitutional discrimination between aliens eligible to citizenship and ineligible aliens with respect to the lawful trade of bringing into the State fish caught on the high seas. In this aspect, the Court said, the State was not dealing with the disposition of its own property. Further, it found in the legislative history of the statute an obvious purpose to eliminate Japanese aliens from commercial fishing (R. 11-18).

The majority of the Supreme Court upheld the statutory classification "in view of the application of the presumption of constitutionality to legislation of this kind,

and because of the broad powers of the legislature in regard to the ownership, regulation and protection of wildlife" (R. 39). It declared that petitioner had not established with any certainty that the legislature had intended to discriminate against the Japanese alone (R. 39-41). Application of the statute to fish caught beyond coastal waters was upheld as within the police power, as a means of making effective the State's policy with respect to the conservation and distribution of its common property (R. 42-45).

The dissenting opinion declared the issue to be "whether an alien resident may be excluded from engaging in a gainful occupation—from working—making a living" (R. 45). It quoted at length from this Court's opinion in *Truax v. Raich*, 239 U.S. 33, in support of the view that this right may not be denied (R. 46-48). It found no reasonable basis for the classification of applicants for licenses on the basis of either alienage or eligibility to citizenship (R. 48-53). Finally, it found "highly persuasive arguments" that the statute is aimed solely at Japanese (R. 53).

### Summary of Argument

The legislative history of Section 990 and facts of common knowledge which have been reviewed in recent opinions of this Court make it plain that the sole purpose of the provision here in question was to deprive alien Japanese of the right to earn their living in the common occupation of fishing. This is a denial of the basic constitutional right which this Court upheld in *Yick Wo v. Hopkins*, 118 U. S. 356, and *Truax v. Raich*, 239 U. S. 33.

The statute is not aided, as the Court below thought, by the presumption of constitutionality. Statutes which discriminate against particular minority groups, and especially those directed against aliens who cannot vote, are subject to "searching judicial inquiry" and can be upheld only under "the most exceptional circumstances."

The "proprietary" power of the State over the fish in its waters does not support the statute. Even if its application were limited, as it is not, to the taking of fish from the State's territorial waters, that power is subject to the basic constitutional limitation that it may not be used as a subterfuge to accomplish an unconstitutional purpose.

Even if the patent intention to discriminate solely against the Japanese is disregarded, the classification of residents of the State on the basis of either alienage or ineligibility to citizenship for the purpose of withholding fishing licenses is an arbitrary one, having no rational relation to the professed purpose of the statute and hence violates the equal protection clause.

Whatever defense may be advanced for the statutory classification as applied to the taking of fish from the State's territorial waters, the discrimination which it makes is plainly invalid as applied to the bringing ashore of fish caught on the high seas. While the State may apply genuine conservation measures to that activity, it may not compound its own power by extending in the exercise of the "police power" a discrimination which has its only conceivable justification in the fact that it is exercising a "proprietary power."

## I

**Section 990 contains an unconstitutional discrimination against the Japanese residents of California solely by reason of their national origin.**

The State of California issued commercial fishing licenses to petitioner annually from 1915 to 1941. The first statutory bar to the granting of a license to him was introduced in 1943, when Section 990 of the Fish and Game Code was amended to provide that "A commercial fishing license may be issued to any person other than an alien

Japanese." In 1945 this sentence was amended by eliminating the reference to "alien Japanese" and substituting therefor "a person ineligible to citizenship."

The history of this 1945 amendment is set forth in the opinion of the Superior Court in this case (R. 17). A Senate Fact-Finding Committee on Japanese Resettlement created in 1943 filed its report on May 1, 1945. Under the heading "Japanese Fishing Boats" that report contains the following paragraph:

"The committee gave little consideration to the problem of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have been previously covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship.

The committee has introduced Senate Bill 413 to make this change in the statute."

Senate Bill 413, as introduced by this committee, was enacted in 1945.

The majority opinion of the State Supreme Court states that "it may be inferred" that, by this amendment, "the legislature desired to extend conservation measures and did not rewrite the statute for the purpose of discriminating against alien Japanese" (R. 40). In view of this statement it seems appropriate to look at the other subjects covered in the Senate committee's report. The other section headings are "Alien Land Law", "Japanese Language Schools", "Dual Citizenship", and "Tulelake Riot". The committee's recommendations, listed in the conclusion of the report, included proposals for strengthening the Alien Land Laws and their enforcement, and for regulation of Japanese language schools. The concluding sentence reads:



"The committee is vigorously opposed to the return of any Japanese to California until after the end of the war with Japan."

On the present subject the committee stated its conclusion as follows:

"The *Japanese fishing bill*, in the opinion of the committee, does not require extensive revision, but should be modified to apply to aliens ineligible to citizenship rather than to refer specifically to Japanese." (Italics added.)

Against this background we are confident that this Court will recognize the present statute for what the California legislature intended it to be—a means of keeping the Japanese out of the fishing business and not a conservation measure. The case was decided in the State court before this Court handed down its decision in *Oyama v. California*, 92 L. Ed. 257. The opinions in that case leave no room for doubt that the patent subterfuge of the statutory classification of ineligible aliens as a separate group for the purpose of regulating fisheries must be disregarded.

The statute in its original form was directed against the Japanese expressly. In that form it seems clear that the court below would not have attempted to defend it as a conservation measure. The amendment which put it into its present form was motivated solely by a desire to make the original measure effective. Not fish or conservation, but the Japanese alone, were the sole concern of the committee which introduced the amendment and of the legislature which enacted it exactly as it was introduced. The "Japanese fishing bill", as the committee called it, was designed solely to deprive the Japanese residents of the State of the opportunity to earn their living in the common occupation of fishing. The decisions of this Court leave no room for doubt that such legislation violates the equal protection clause.

*Truax v. Raich*, 239 U. S. 33;

*Yick Wo v. Hopkins*, 118 U. S. 356.

The contention that in spite of this history the statute must be viewed as a bona fide regulation of the State's fisheries requires a naïveté which this Court has consistently refused to display. The situation may be compared to that presented by the Chinese Bookkeeping Act in the Philippines. *Yu Cong Eng v. Trinidad*, 271 U. S. 500. In holding that Act invalid Chief Justice Taft said (514):

"Nor is there any doubt that the Act as a fiscal measure was chiefly directed against the Chinese merchants. The discussion over its repeal in the Philippine legislature leaves no doubt on this point."

See also *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 85, where Mr. Justice Holmes described a State statute as "a bill of pains and penalties disguised in general words." That the present statute is aimed solely at the Japanese is even more apparent, if that is possible, than in the case of the alien land laws, of which Mr. Justice Black says (*Oyama v. California*, 92 L. Ed. at 265):

"That the effect and purpose of the law is to discriminate against the Japanese because they are Japanese is too plain to call for more than a statement of that well-known fact."

Certainly the presence in the State of a few non-Japanese aliens who are ineligible to citizenship is as immaterial as was the fact in *Yick Wo v. Hopkins*, *supra*, that the Commissioners had denied a laundry license to one non-Chinese applicant.

The purpose and effect of the present statute is to deny the petitioner "the right to work for a living in the common occupations of the community" which this Court declared to be "of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." *Truax v. Raich*, *supra*, 233 U. S.

at 41. Accordingly, we turn to the considerations advanced by the court below in an effort to avoid the force of that decision.

## II

**The presumption of constitutionality is inapplicable to measures directed against racial or national minorities.**

The presumption of constitutionality was invoked by the majority of the State Supreme Court. After declaring that a legislative classification will be upheld "unless it is palpably arbitrary", the opinion referred to the "only possible limitation upon this rule" as that "where the legislation attempts to restrict fundamental liberties" (R. 36). This statement is followed by the citation of *United States v. Carolene Products Co.*, 304 U. S. 144, 152. That opinion, we submit, and the cases which have followed it, completely refute the proposition for which it is cited. In the often-cited footnote in the *Carolene* case, to which the Court referred, Chief Justice Stone suggested, but found it unnecessary to decide, whether legislation which restricts the political processes that are normally relied upon to bring about the repeal of undesirable legislation "is to be subject to more exacting judicial scrutiny under the general prohibition" of the Fourteenth Amendment than most other types of legislation. He then proceeded to pose the question which is directly pertinent here:

"Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religions, . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

To this question later decisions of this Court have given an unequivocal affirmative answer.

*Hirabayashi v. United States*, 320 U. S. 81, 100;

*Korematsu v. United States*, 323 U. S. 214, 216;

*Oyama v. California*, 92 L. Ed. 257, 264;

*Cf. Pearl Assurance Co. v. Harrington*, 38 F. Supp. 411, 413, aff'd 313 U. S. 549.

In the last of these cases Mr. Justice Frankfurter in the District Court, cited the footnote quoted above from the *Carolene* opinion in support of the statement that "We do well to scrutinize legislation that avowedly discriminates against aliens." In the other three cases the discriminations which were under consideration were directed against citizens based upon their Japanese ancestry. In *Oyama* the Chief Justice wrote:

"There remains the question whether discrimination between citizens on the basis of their racial descent, as revealed in this case, is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause . . ."

The present discrimination is directed against a particular group of individuals who are not citizens and who cannot at this time become citizens. Politically that group, because it has been denied both the right to vote and the hope that it will be able to vote in the future, is the weakest in the population. For the reason given by Chief Justice Stone in the *Carolene* case, *supra*, they are in need of a "correspondingly more searching judicial inquiry." That need is made even more acute by the record of hostility, fanned by the war, which is written in the recent reports of this Court. In the present case the inquiry goes to the extent of the State's extraordinary power over its natural resources and the constitutional limitations upon the exercise of that power.



## III

Section 990 may not be upheld under the "proprietary" power of the State over the fish in its waters. That power is subject to constitutional limitations and may not be used as a pretext for discrimination between residents of the State on racial grounds.

We shall not consider the effect of the decision in *United States v. California*, 332 U. S. 19, on the State's authority over fish within the three-mile limit. That issue is now pending before this Court. *Toomer v. Witsell*, October Term, 1947, No. 415. We shall assume, *arguendo*, that for purposes of fish conservation those waters are to be considered territorial waters of the State.

The court below appears to have taken the view that the broad power of the State over fish and game is subject to virtually no constitutional limitation. It quoted with approval the statement in *Lubetich v. Pollock*, 6 F. (2d) 237, 240, that "the state owns the food fish in the waters over which it has jurisdiction, the same as any other proprietor owns property", and that its power "arises out of and is incidental to the ownership of the property."

We submit that this view of the State's power is contrary to this Court's declarations on the subject, and that it has been applied to reach a result which cannot be supported by any decision of this Court. The classic statement which has often been repeated is that of Mr. Justice White in *Geer v. Connecticut*, 161 U. S. 519, 529:

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the

government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 41 U. S., 16 Pet. 410, represents its people, and the ownership is that of the people in their united sovereignty.

This conception that the State's power must be exercised like all other powers of government as a trust for the benefit of the people" can mean only that constitutional limitations exist, determined as in all other cases by the courts. In the several cases, like the *Geer* case, which have upheld the extraordinary power of the States to regulate wild life in a manner that would not be permissible where other types of property were involved, there is implicit in this Court's opinions a recognition of the applicability of certain constitutional limitations. Those cases afford illustrations of an extraordinary power to control a particular species of property. They furnish no support for the proposition that that power may be utilized to discriminate against lawful residents of the State in a manner that is wholly unrelated to the faithful performance of the State's trust for the benefit of its people. In the *Geer* case, for example, it was held that the commerce clause does not invalidate a statute prohibiting the possession of game for the purpose of transporting them outside of the State. *McCready v. Virginia*, 94 U. S. 391, held that the privilege of planting oysters in the waters of the State is not one of the privileges and immunities which Article I4, Section 2, guarantees to citizens of other States.\* *New York ex rel. Silz v. Hesterberg*, 211 U. S.

\* The extent of permissible discrimination against non-residents of the State is involved in *Toomer v. Witsell*, Oct. Term 1947, No. 15, now pending in this Court. See *Pavel v. Pattison*, 24 F. Supp. 15; *Pavel v. Richard*, 28 F. Supp. 992. These cases involve the question of the power of the State to impose limitations on the doing of business by non-residents. That issue is a very different one from that of the State's power to discriminate among its own residents regarding their participation in a common occupation.

31, held that it is consistent with the due process clause and the commerce clause for a State to prohibit the possession, during the closed season, of game birds even though they had not been taken or killed within the State. It is obvious that the statutes upheld in these cases were all reasonably adapted to the legitimate purpose of making effective the State's policy of conserving its natural resources for its own people. The designation of the State's power as a "proprietary" one did not remove all constitutional questions. It merely served to define the public interest against which the individual's assertion of a constitutional right was weighed.

This application to conservation measures of the usual process of constitutional adjudication is even more apparent in the more recent cases. In *Lacoste v. Department of Conservation*, 263 U. S. 545, a Louisiana statute imposing a severance tax upon skins and hides taken from wild fur-bearing animals, was upheld as "a valid exertion of the police power of the state to conserve and protect wild life for the common benefit" (550). This Court found it unnecessary to consider whether the tax might be upheld by virtue of the State's power to prohibit the removal of wild game. Although that power was asserted by the State, the opinion contains an emphatic assertion of this Court's function in passing upon the constitutional issue, which in that case happened to have arisen under the commerce clause. The Court wrote (550):

"This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it interferes with or burdens interstate commerce. The name, description, or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form."

The same approach appears under the equal protection clause in *Patson v. Pennsylvania*, 232 U. S. 138. In

upholding the Pennsylvania statute, which made it unlawful for any unnaturalized foreign-born resident to possess a shotgun, Mr. Justice Holmes adopted the approach which he consistently applied to cases arising under the Fourteenth Amendment. He regarded the prohibition as obviously related to the lawful object of protecting wild life and the discrimination against aliens as conceivably based upon a knowledge of local conditions as to the peculiar source of the evil which the legislature desired to prevent.

The *Patsoné* case is the only one in this Court dealing with the State's power over wild life which has upheld a discrimination against residents of the State based upon their non-citizenship. The decision was not grounded upon the concept that the State was acting with the prerogatives of a private property owner. Any attempt to justify the decision under that power must face the significant fact that there was a dissent by Chief Justice White, who had written the opinion in *Geer v. Connecticut*, *supra*. Its rationale is exactly that of the later decision in *Ohio ex rel. Clarke v. Dekebach*, 274 U. S. 392, upholding an ordinance which barred aliens from operating poolrooms. We do not believe it necessary, for the purpose of this case, to dwell upon our doubts as to the soundness of these decisions, for we think it clear that though the rule of the *Patsoné* case be accepted, it affords no support for the present statute.

For all that appears in the *Patsoné* opinion, the activity from which aliens were barred was that of hunting for sport. The discrimination in the earning of a living, which this Court shortly thereafter declared unconstitutional, *Truax v. Raich*, 239 U. S. 33, was not in issue. There can be no dispute that the interest for which the present petitioner seeks constitutional protection is of a much more fundamental character than that which *Patsoné* sought to protect. The reports of the California Bureau of Marine Fisheries, which are cited in the brief filed by petitioner's counsel and the statistical data quoted from those reports, show conclusively that California by its



licensing legislation is not attempting to keep fish within its waters but to promote and indeed to expand an important commercial business. Petitioner is not seeking to share in the enjoyment of property which the State has elected to retain for its own citizens but to participate in that business on the same basis that is open to all other persons, whether residents of the State or non-residents, citizens or non-citizens.

We need not consider whether, even under Mr. Justice Holmes' approach, the State should be permitted to draw a line, not between citizens and non-citizens, but between a particular group of non-citizens and all other persons. Certainly, such a line of distinction must tax the most extreme deference to the supposedly superior knowledge of the State legislature about local conditions. In the last analysis the decision in the *Patson* case rests upon the presumption of constitutionality. We have shown (Point I) that later opinions of this Court create almost an exactly opposite presumption in cases where the statute patently discriminates against a minority national or racial group. Here no "searching judicial inquiry" is required to reveal the State's purpose to use the supposed power over its natural resources to deprive a particular stigmatized group of the State's residents of an opportunity to participate in one of the State's important commercial enterprises. Facts of common knowledge, which are fully reflected in this Court's opinions in the *Hirabayashi*, *Korematsu* and *Oyama* cases, compel recognition that Mr. Justice Holmes' extreme display of judicial deference to the legislative judgment about local conditions is wholly inappropriate in the present situation.

That the State's "proprietary" power over natural resources may not be used as a subterfuge for the deprivation of constitutional rights is shown by this Court's decisions that it was error to deny temporary injunctions against the enforcement of the Louisiana Shrimp and Oyster Acts. *Foster Fountain Packing Co. v. Haydel*,

278 U. S. 1; *Johnston v. Haydell*, 278 U. S. 16. These acts were ostensibly passed for the purpose of preserving natural resources to the State's inhabitants. The Shrimp Act made it unlawful to export shrimps from the State from which the heads and hulls had not been removed. This Court upheld the claim that the statute was a subterfuge designed to compel the removal of a canning plant from Mississippi to Louisiana and thereby directly to obstruct and burden interstate commerce. It wrote (13):

"The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the state necessarily releases its hold, and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trust upon which the state is deemed to own or control the shrimp for the benefit of its people. And those taking the shrimp under the authority of the act necessarily thereby become entitled to the rights of private ownership and the protection of the commerce clause. They are not bound to comply with, or estopped from objecting to the enforcement of, conditions that conflict with the Constitution of the United States."

Although a different constitutional provision is here invoked, the analogy is clear between the *Foster Fountain* case and the present one. The purpose of the California legislation is not to retain the fish or to prevent it from becoming an important article of commerce, both local and interstate. The supposed power to act as a private owner, free of constitutional limitations, has been invoked for the ulterior purpose of depriving a small proportion of the State's population from the opportunity to participate in that commerce. The manner in which that small group has been selected is as obviously a viola-

tion of the equal protection clause as was Louisiana's attempt to monopolize shrimp canning a violation of the commerce clause. The attempt to impose an unconstitutional condition upon the grant of a right which the State might theoretically withhold altogether must be stricken down in the present case, just as it was in the Louisiana cases.

The fallacy of the State's argument to the contrary has been most forcefully presented by Professor Thomas Reed Powell, in criticism of this Court's decision in *Heim v. McCall*, 239 U. S. 175, upholding the exclusion of aliens from employment on public works. T. R. Powell, *The Right to Work for the State*, 16 Columbia Law Review 99. Professor Powell wrote (111, 112):

"Logically, a thing which may be absolutely excluded is not the same as a thing which may be subjected to burdens of a different kind, even though such burdens would be regarded by all as less onerous than the burden of absolute exclusion. The 'power of absolute exclusion' is a term not identical with the 'power of relative exclusion' or the 'power to impose any burdens whatsoever.' . . . The fact that the right of the state to exclude some by excluding all is not denied by the due process clause has no bearing upon the question whether the right to exclude some but not all is denied by the equal protection clause."

The logic of Professor Powell's argument has been applied in many varied situations. Perhaps the most important, historically, is the line of decisions holding invalid the imposition of unconstitutional conditions upon the grant of authority to foreign corporations to do business in a State. This analogy was plainly recognized by this Court in the *Foster Fountain Packing Company* case, *supra*, where the Court cited *Power Manufacturing Company v. Saunders*, 274 U. S. 490, and *Hanover Fire Insurance Company v. Harding*, 272 U. S. 494, cases in which the equal protection clause was successfully invoked by the foreign corporations. The grant of a legal education is not a right which the due process clause requires the State

to offer, but when it is offered, the equal protection clause prohibits the maintenance of discriminatory conditions based upon race, creed or color. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Board of Regents of University of Oklahoma*, decided January 12, 1948. In *Hannigan v. Esquire*, 327 U. S. 146, 156, this Court cited the dissenting opinions of Justices Brandeis and Holmes in *United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson*, 255 U. S. 407, 421-3, 430-2, 437, 438, in pointing to the grave constitutional questions posed by the exercise of censorship through the denial of the second class mailing privilege, a subsidy which Congress is certainly free to withhold from all.

There is nothing new about the present attempt to invoke the theoretically complete power of the State over a particular subject as a guise for the denial of constitutional rights to the Orientals in California. Following the first flood of Chinese immigration a deliberate, undisguised effort was written into the California Constitution to drive the Chinese out of the State. See *In re Triburco Parrott*, 1 Fed. 481, and *In re Ah Chong*, 2 Fed. 733. The Constitution of 1879 contained the following declaration (Art. 19, Sec. 4):

"The presence of foreigners, ineligible to become citizens of the United States, is declared to be dangerous to the well-being of the state, and the legislature shall discourage their immigration by all the means within its power."

The *Parrott* case held unconstitutional an act passed pursuant to this provision which made it a crime for a corporation to employ any Chinese or Mongolian. The reserved power of the State over the corporate charters was unsuccessfully invoked in support of this statute. The *Ah Chong* case declared invalid a statute passed at the same time which prohibited "all aliens incapable of becoming electors of this state from fishing." This statute was defended under *McCready v. Virginia*, 94 U. S. 391, as a



mere denial of a privilege which the State could withhold. The Court rejected this defense and held the statute invalid under both the Treaty with China and the equal protection clause. Conceding the power of the State to exclude all aliens from fishing, it was held that the privilege could not be denied to Chinese while it was granted to other aliens. After so holding, Judge Sawyer continued (2 Fed. at 737):

"It is obvious, also, from a consideration of these various provisions of the new state constitution, and the several statutes *in pari materia* referred to, considered in connection with the public history of the times, that the act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the state as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the state, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in Parrott's case, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be if used in a proper case and for a legitimate purpose."

The present effort by the State of California to deprive the Japanese of the opportunity to earn a livelihood by every constitutional pretext that can be found in the decisions of this Court is considerably more sophisticated than the measures directed against the Chinese during the last century. This Court does not permit such sophistication to whittle away basic constitutional rights. See *Lane v. Wilson*, 307 U. S. 268, 275.

## IV

Even if the State's purpose to discriminate against the Japanese alone be disregarded, the statutory discrimination against aliens ineligible to citizenship must be held to deny petitioner the equal protection of the laws.

Even if the purpose to single out the Japanese for discriminatory treatment is to be ignored and the statutory language is to be read in the abstract, with that blindness to the surrounding circumstances for which the State apparently contends, the State's case is no stronger. The applicable rule under the equal protection clause was accurately stated in the opinion of the court below (R. 35):

"The rule is that the classification must not be arbitrary, but must be based upon some difference in the classes having a substantial relation to a legitimate object to be accomplished."

Assuming the "legitimate object" here to be the conservation of the State's natural resources, we think it plain that there is no rational relation between the accomplishment of that object and the classification of the State's residents based upon either citizenship or eligibility to citizenship. The point was made in the dissenting opinion below in a manner which we consider to be unanswerable (R. 49-51):

"There is no sound basis for the argument that because the fish and game belong to the people of the state, the taking of them may be prohibited to all, and that with such a broad power any group of people may be arbitrarily excluded from the right (fol. 103) to take any portion thereof. On the basis of that reasoning the Legislature could validly prohibit persons ineligible to citizenship from using the highways. They belong to the state and the traffic hazards would be less if fewer people were using them. The same is true of the use of the parks, schools and other public buildings and places. It could be argued that they

are overcrowded and the more people using them the greater the cost to the public, all to the diminishment of the resources of the state natural or otherwise. While the state may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection principle of all meaning. If aliens are to be given equal protection, and they must, then to put them all in a class by themselves is to refute the very premise of the doctrine. Manifestly there is no rational basis for the classification. When the lack of a proper ground is patent on the face of legislation, proof of its lack of rationality is unnecessary. Suppose a statute declared that red headed persons could not engage in certain occupations. Plainly a red head could not prove there was no possible reason why the public welfare is more jeopardized by having red heads than others in those callings. He would simply say all that any one could say: "That such a classification is pure nonsense," and 'here is not a court in the land that would not agree with him.

. . . .

"Even if we assume that aliens as such may be excluded from some vocations or pursuits, yet *there is no conceivable basis for discrimination between different classes of aliens*. In the instant case *not all aliens* are shut out of commercial fishing. It embraces only those 'ineligible to citizenship' (fol. 105). Other aliens may follow that enterprise. Thus we have at least one complete answer to the proposition that because the fish are owned by the people of the state (people being used in the sense of a citizen of the state and aliens are not citizens) all non-citizens may be excluded from taking the fish. That reasoning requires the exclusion of *all* aliens. It furnishes no justification for excluding some aliens and not others. The majority opinion suggests no possible basis for such classification and I do not believe there is any. Such a classification is based upon a mere ipse dixit and nothing more."

In support of the classification based on eligibility to citizenship, the majority opinion below cited *Terrace v.*

*Thompson*, 263 U. S. 197. We shall not here reargue the constitutionality of the alien land laws. We believe that the cases upholding them were wrongly decided, as four Justices of this Court declared in the *Oyama* case. That issue need not be decided here, for the present statute is plainly distinguishable. The distinction, in fact, was made in this Court's opinion in *Terrace v. Thompson*, *supra*. After restating the holding of *Truax v. Raich*, *supra*, that the right to work for a living in the common occupations is a part of the freedom which the Fourteenth Amendment secures, Mr. Justice Butler wrote (263 U. S. at 221):

"In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the state. The quality and allegiance of those who own, occupy, and use the farm lands within its borders are matters of highest importance, and affect the safety and power of the state itself."

Plainly there is no such relation to the "safety and power of the state itself" in the identity of the individuals engaged in commercial fishing that was asserted to exist in the "privilege of owning or controlling agricultural land." The transitory character of the petitioner's occupation stands in sharp contrast to the permanence of the relationship to the community that is assumed when agricultural land is acquired. If that relationship can be thought to give the State a special interest in the ownership of land, no similar interest can be found regarding the status of the individuals engaged in the fishing business. The pursuit of that business stands on no different footing from the standpoint of the participant's devotion to the State than does the "common occupation" of the cook whose constitutional right was vindicated in *Truax v. Raich*, *supra*, or the laundryman who was upheld in *Yick Wo v. Hopkins*, *supra*. It is axiomatic that a classification may be valid for one purpose and unconstitutional



when applied to an entirely different field. While the State's adoption of the federal standard of eligibility to citizenship was upheld in the alien land law cases, a classification based on citizenship was held in *Truax v. Raich, supra*, to bring the State's statute "into hostility to exclusive federal power." The present case, we submit, is controlled by the holding in *Truax v. Raich, supra*, that "reasonable classification implies action consistent with the legitimate interests of the state" (239 U. S. 42).

We believe that the classification which California has adopted has brought its action "into hostility to exclusive federal power", although we are not arguing that point. For present purposes it is sufficient that no legitimate interest of the State can reasonably be thought to be advanced by the present discrimination against residents merely because they are ineligible to citizenship.

## V

**Whatever power the State may have over fish caught in its territorial waters, application of the statutory discrimination to the bringing ashore of fish caught on the high seas is plainly unconstitutional.**

To this point we have considered the present case on the assumption most favorable to the State—that the statute relates only to the taking of fish in waters over which the State has territorial jurisdiction. The statute is not so limited. It requires a license from every person who brings or causes fish to be brought ashore at any point in the State for the purpose of selling it in a fresh state. The effect of the decision below is to prohibit the petitioner not only from fishing in California waters, but also from bringing to the shore fish caught on the high seas.

It is, of course, well settled that measures genuinely directed at conservation may constitutionally be applied

to all fish brought to the State's shores. *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422. The doctrine of that case, based on the practical necessity for the regulation in order to make effective a purpose admittedly within the State's power which could otherwise be evaded, is not confined to measures for the protection of natural resources. Compare *Purity Extract Co. v. Lynch*, 226 U. S. 192; *Booth v. Illinois*, 184 U. S. 425. Application of that doctrine in the present situation, however, results in a destruction of basic constitutional rights for which there is no conceivable justification.

This part of the statute was upheld by the court below, not under the State's "proprietary" interest in the fish, but as an exercise of the "police power" (R. 42). Having reached the conclusion that the statute is valid as to fish caught within the State's waters, its application to all fish brought to the shore is held necessary to make effective the measure which it had previously held justified only under the "proprietary" power. A very similar argument was advanced by the State in *Oyama v. California*, *supra*, where it was explicitly rejected. The Chief Justice there wrote (92 L. Ed. at 264-265):

"The only justification urged upon us by the State is that the discrimination is necessary to prevent evasion of the Alien Land Law's prohibition against the ownership of agricultural land by ineligible aliens . . . But assuming, for purposes of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it. In the light most favorable to the State, this case presents a conflict between the State's right to formulate a policy of landowning within its bounds and the right of American citizens to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin."

Similarly here, assuming the constitutionality of the asserted exercise of the State's "proprietary" power, the

very statement that this part of the statute can be upheld only under the "police power" constitutes a recognition that it is subject to a more exacting constitutional limitation than the part relating to the State's own waters. And here, in the light most favorable to the State, there is presented a conflict between the State's "right" to exclude ineligible aliens from sharing in its fish, and the right of those aliens to earn their living by fishing on the high seas.

Resolution of that conflict in favor of the individual's constitutional right is, we submit, required even more plainly here than it was in the *Oyama* case. There, the exclusion of ineligible aliens from land ownership was the expressed purpose of the basic prohibition which the Court's opinion assumed to be valid. Here, if we assume the validity of the basic provision barring these aliens from fishing in the State's waters, that exclusion is not the end in itself, but merely a measure which the State, acting as "owner", decrees under the guise of conserving its own property. To permit the extension of that discrimination to the taking of fish which the State does not "own" would mean the compounding of the State's extraordinary power over wild life to a degree that has no conceivable justification, and a corresponding whittling away of the right of aliens to work for a living and hence to reside in the State. Such an inroad upon the rule of *Truax v. Raich*, *supra*, should not be sanctioned.

The brief which has been filed by counsel for the petitioner shows that fishing in waters beyond the State's territorial jurisdiction constitutes a substantial, if not the major, part of the important commercial activity for which petitioner is required to have a license. The State, in its brief in opposition to the petition for certiorari, took the position that under the California statute the Commission could not grant a license limited to fishing on the high seas (pp. 7-8). Accepting that view of the statute, it necessarily follows that the constitutional test applicable to fishing on the high seas is that by which the entire statute

must be judged. No matter what power the State may derive from its "proprietary" interest, that part of the statute which the court below upheld under the "police power" denies to petitioner the equal protection of the laws. Since the State takes the position that the Commission must grant both privileges or neither, we submit that the invalidity of the restriction on fishing on the high seas necessarily condemns also the restriction on fishing in territorial waters.

### CONCLUSION

During the recent war the Federal Government considered itself forced to take steps which discriminated against persons of Japanese ancestry because of race. Those steps were upheld by this Court solely because of "pressing public necessity." *Korematsu v. U. S.*, 323 U. S. 214, 216; *Hirabayashi v. U. S.*, 320 U. S. 81. That necessity was found in the fact that the Japanese group had been set apart by just such regulations as are here challenged. This Court said:

"The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachment to Japan and its institutions" (*Hirabayashi* case, 320 U. S. at p. 98).

The very fact that such steps were undertaken during the emergency of war increases the importance of acting during the time of peace to eliminate the evils which prompted them. The only hope that they may never again be held necessary lies in the encouragement of the process whereby all groups within the United States become a well-integrated part of the population. The classic American approach, embodied in our Constitution, is to open all occupations to all, not to drive one racial, religious or



national group out of some occupations, thereby increasing their concentration in others. This process will be inevitably retarded by legislation which reinforces distinctions between races by creating legal, social and economic patterns in which such distinctions are decisive.

Respectfully submitted,

AMERICAN JEWISH CONGRESS,  
AMICUS CURIAE,

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*Counsel for Amicus Curiae.*

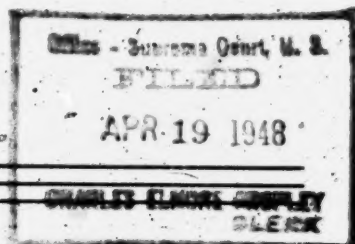
AMBROSE DOSKOW,  
*of Counsel.*

April 16, 1948.





FILE COPY



IN THE  
**Supreme Court of the United States**  
October Term, 1947

No. 533

TORAO TAKAHASHI,

*Petitioner,*

*v.*

FISH AND GAME COMMISSION, LEE F. PAYNE, as  
Chairman thereof, W. B. WILLIAMS, HARVEY E.  
HASTAIN, and WILLIAM SILVA, as members thereof.

**MOTION AND BRIEF FOR THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE AND THE NATIONAL  
LAWYERS GUILD AS *AMICI CURIAE*.**

✓ THURGOOD MARSHALL,

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✓ MARIAN WYNN PERRY,

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PAYNE, as Chairman thereof, W. B.  
WILLIAMS, HARVEY E. HASTAIN, and  
WILLIAM SILVA, as members thereof.

**MOTION AND BRIEF FOR THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE AND THE NATIONAL  
LAWYERS GUILD AS AMICI CURIAE.**

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.**

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

The undersigned, as counsel for and on behalf of the National Association for the Advancement of Colored People, and the National Lawyers Guild, respectfully move that this Honorable Court grant them leave to file the accompany brief as *amici curiae*.

The issue at stake in the above entitled cause is the power of a state to discriminate on racial grounds among persons within its jurisdiction in their exercise of the right to earn a living in a common occupation. The determination of this issue involves an interpretation of the Fourteenth Amendment which will have widespread effect upon the welfare of all minority groups in the United States.

Consent of the parties for the filing of this brief has been obtained for the National Lawyers Guild and has been requested for the NAACP and will be filed as soon as received.

THURGOOD MARSHALL,

*Counsel for the National Association  
for the Advancement of  
Colored People.*

MARIAN WYNN PERRY,

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EDWARD R. DUDLEY,

*Of Counsel.*

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**BRIEF FOR THE NATIONAL ASSOCIATION FOR  
THE ADVANCEMENT OF COLORED PEOPLE AND  
NATIONAL LAWYERS GUILD AS AMICI CURIAE.**

**Opinion Below.**

**Statute Involved.**

The opinion below and the statute involved are set forth in full in the record and in the Petition for Certiorari filed herein.



### Questions Presented.

1. Whether a statute of the State of California denying to aliens ineligible to citizenship the right to earn their living by commercial fishing is consistent with the Fourteenth Amendment.

2. Whether such statute is an interference with the supremacy of the Federal government in the field of international law and in conflict with treaty obligations of the United States.

### Statement of the Case.

The petitioner herein is a citizen of Japan who, under the naturalization laws of the Federal government, is presently ineligible to citizenship. He has resided in Los Angeles, California, continuously since 1907 with the exception of that period of time when he was excluded from California under the Military Exclusion laws adopted during World War II. From 1915 until the Military Exclusion laws petitioner earned his living by commercial fishing on the high seas off California, which activity was carried on pursuant to a license granted by the Fish and Game Commission of the State of California (R. 1-6).

In 1945, just prior to the restoration of freedom of movement to Japanese aliens who had been excluded from California, the state legislature amended Section 990 of the Fish and Game Code (California Stats. 1945, Ch. 181) to prohibit the issuance of a commercial fishing license to persons ineligible to citizenship or to corporations the majority of whose stockholders, or any of whose officers, were ineligible to citizenship. Upon the face of the statute, no other criterion is applied for the issuance of such licenses.

Upon petitioner's return to California in October, 1945, he found himself, in the last years of his life, excluded from employment as a commercial fisherman after almost thirty years of gainful employment in that field.

The court of original jurisdiction, the Superior Court of the State of California, in and for the County of Los Angeles, found that this statutory restriction was unconstitutional and granted a writ of mandamus (R. 7). On appeal to the Supreme Court of California, the judgment of the lower court was reversed and the constitutionality of the statute was upheld (R. 30-45). Three judges dissented from this holding. The decision of the Supreme Court of California is now before this Court on writ of certiorari.

## **SUMMARY OF ARGUMENT.**

### **I.**

Since there is no rational basis for the discrimination embodied in the statute, it comes into fatal conflict with the Fourteenth Amendment.

### **II.**

State legislation excluding aliens from the right to work is an interference with the national sovereignty.

A. The legislation here presented is an attempt to exclude a class of aliens from residing in the state.

B. The right to exclude aliens is vested solely in the Federal Government.

### **III.**

A state law denying to a racial group the right to engage in a common occupation violates the obligations of the United States under the United Nations Charter.

## ARGUMENT.

### I.

**Since there is no rational basis for the discrimination embodied in the statute, it comes into fatal conflict with the Fourteenth Amendment.**

That this legislation is directed at Japanese aliens is conclusively proven by the 1940 Census figures which show 33,569 Japanese ineligible to citizenship residing in California and fewer than 900 others in the entire continental United States.

Since the adoption of the Fourteenth Amendment this Court has been vigilant in assuring that legislative classification of persons resulting in discrimination should bear a reasonable relationship to the achievement of legitimate ends of government. In a long line of decisions legislation has been declared unconstitutional where classification has been based on race alone.

Considering an ordinance fair on its face, but in practice discriminatory against the Chinese, this Court said of the discrimination:

"No reason for it is shown and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which petitioners belong, and which in the eye of the law is unjustified."

Of similar classification Mr. Justice HOLMES speaking for this Court said:

"States may do a great deal of classifying that it is difficult to believe rational but there are limits,

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*Yick Wo v. Hopkins*, 118 U. S. 356, 374.

and it is . . . clear . . . that color cannot be made the basis of statutory classification.”<sup>2</sup>

The Supreme Court of California justified this legislation as based upon “the broad powers resting in the state in regard to the regulation of its fish and game” (R. 38). In the exercise of that power the court said:

“Obviously if the legislature determines that some reduction in the number of persons eligible to hunt and fish is desirable, it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so” (R. 38).

Even assuming, *arguendo*, as the petitioners do not concede, that these fish are the “property” of the state, the issue remains whether the state may condition the granting of licenses solely upon the race of the applicant, without establishing any relationship between the object to be attained, presumably conservation, and the proscribed group.

The criticism of this theory put forth as fair and logical which was made by the dissenting opinion completely exposes its lack of logic:

“I can see no logic in depriving resident aliens, even though they are not eligible to citizenship, of the means of making a livelihood, including the pursuit of commercial fishing. They are lawfully inhabitants and residents of the state. Even if it be assumed that non residents, both alien and citizens of the United States, may be excluded from game and fish on the theory that such resources belong to the people of the state, the fact remains that resident aliens are a part of the people—the inhabitants and

<sup>2</sup> *Nixon v. Herndon*, 273 U. S. 536, 541; See also *Buchanan v. Warley*, 245 U. S. 60; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Yu Cong Eng v. Trinidad*, 271 U. S. 500.



residents of this state. Because some believe that aliens should be punished by such a penalty is no basis for a reasonable classification. There is no sound basis for the argument that because the fish and game belong to the people of the state, the taking of them may be prohibited to all, and that with such a broad power any group of people may be arbitrarily excluded from the right to take any portion thereof. On the basis of that reasoning the Legislature could validly prohibit persons ineligible to citizenship from using the highways. They belong to the state and the traffic hazards would be less if fewer people were using them. The same is true of the use of the parks, schools and other public buildings and places. It could be argued that they are over-crowded and the more people using them the greater the cost to the public, all to the diminishment of the resources of the state natural or otherwise. While the state may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection principle of all meaning" (R. 49).

The complete lack of reasonableness of the legislation becomes apparent when one looks to the end which is supposed to be accomplished. There is no limit fixed on the number of licenses which may be issued, nor does the state limit the number of fish to be taken or the period during which fish may be taken. No limits of the size of nets or the equipment used in commercial fishing are established. The licenses are not limited to residents of the state, but persons from throughout the entire country may flock to California, to get licenses and fish without restriction in the coastal waters. For every 100 aliens ineligible to citizenship who are denied commercial fishing licenses, 500 new licensees may come in from every other state or country,

urged on by the thought of a profitable field of endeavor from which skilled workers are now barred by statute. No conservation is achieved.

There being no reasonable relation between the objectives claimed as justification for this statute and the means sought to achieve it, no doubt can be entertained that this legislation like the statute in *Truax v. Raich*<sup>3</sup> is discrimination against a group of unpopular aliens, as such, in competition with citizens. As such it comes into fatal conflict with the Fourteenth Amendment and must fail.

## II.

**State legislation excluding aliens from the right to work is an interference with the national sovereignty.**

The present complicated state of international relations demonstrates the wisdom of the concept that all power in the field of international law, which includes within its scope immigration as well as the power to confer citizenship, must rest wholly in the Federal government. The legislation presented to this Court is an unwarranted and dangerous interference with that power.

**A. The legislation here presented is an attempt to exclude a class of aliens from residing in the state.**

The amendment to the Fish and Game Code prohibiting aliens ineligible to citizenship from engaging in the common occupation of commercial fishing was enacted in 1945 in the midst of an anti-Japanese hysteria on the west coast which exhibited itself in acts of violence which were extended even to honorably discharged veterans who had fought in the American army against the Japanese govern-

<sup>3</sup> 239 U. S. 33.

ment. While on its face this statute makes no mention of race, the dissenting opinion in the court below, viewing the historical background of this legislation and of court decisions on anti-alien legislation in California, found that the law in the instant case is aimed solely at the Japanese (R. 53). See also D. O. McGovney, "Anti-Japanese Land Laws", 35 Cal. Law Review 7, 51. The concurring opinions of Mr. Justice MURPHY and Mr. Justice BLACK in *Oyama v. California*<sup>4</sup> rest in large part upon the fact that legislation against land ownership by aliens ineligible to citizenship in our western states has been "designed to effectuate a purely racial discrimination" . . . "is rooted deeply in racial, economic, and social antagonism" . . . and is the result of "racial hatred and intolerance." Like the Alien Land Law, the California law here under review is designed to "discourage the coming of Japanese into this State."<sup>5</sup>

That the power to exclude aliens from the right to earn their living was also the power to exclude them from entrance and abode was recognized by this Court in *Truax v. Raich*, where it was stated:

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. . . ."

When this fundamental purpose of the law is recognized, it becomes clear that the statute is an interference with the sovereignty of the Federal government in the field of immigration, naturalization, and international law.

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<sup>4</sup> 16 Law Week 4108, — U. S. —

<sup>5</sup> *Estate of Tetsubumi Yano*, 188 Cal. 645.

<sup>6</sup> 239 U. S. 33, 42.

**B. The right to exclude aliens is vested solely in the Federal Government.**

The *Chinese Exclusion Case*<sup>7</sup> established and *United States v. Curtiss Wright*<sup>8</sup> reaffirmed that the investment of the Federal government with the powers of "external sovereignty" in the field of international affairs was "a necessary concomitant of nationality." Indeed, in "The Constitution and World Organization", Professor Corwin has concluded from these cases that in the field of international relations the Federal government does not operate under constitutional restraints.<sup>9</sup> As late as 1945, the law of nations was not viewed as placing any restriction upon the discriminations which a sovereign might practice in establishing tests of undesirability for aliens seeking admission.<sup>10</sup> Thus, the Federal government, and it alone, can admit or exclude aliens, without restriction or limitation under the law today.

Despite the confused state of the law as to citizenship prior to the adoption of the Fourteenth Amendment,<sup>11</sup> today the power to grant or withhold citizenship in our nation is also vested in the Federal government. However, the states continued to vest aliens within their respective boundaries with certain privileges of state citizenship, and it has been said that it was not until 1928 that an election was held in which no alien voted.<sup>12</sup> Their power to do so is not challenged.

<sup>7</sup> 130 U. S. 581.

<sup>8</sup> 299 U. S. 304.

<sup>9</sup> Pp. 6; 19, 29-30. See also M. R. Konvitz, *The Alien and the Asiatic in American Law*, Chapter 1.

<sup>10</sup> C. C. Hyde, *International Law* (2d Ed.) I, 217.

<sup>11</sup> See the opinion of this Court in *Slaughter House Cases*, 83 U. S. 36, where it is stated, at page 73, that prior to 1866: "It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union."

<sup>12</sup> Aylsworth, "The Passing of Alien Suffrage", *Am. Pol. Sci. Rev.* XXV (1931) 114.



But a far different problem is presented when, after the admission of an alien by the Federal government, the state seeks, as here, to place additional and unreasonable burdens upon him. Though the Federal government may be unrestrained by constitutional protections of private rights in determining whether to admit or exclude an alien, once admitted, even though denied national citizenship by Congressional action, the alien is a person clothed with those constitutional guarantees of life, liberty and property and the protection of equal laws which form the basis of a democracy. The states inherit no such unrestricted power in relation to a resident alien as is possessed by the Federal government in regard to an alien seeking entry.

But another and equally serious restriction on the power of states to harry, persecute and, if possible, drive from their border aliens legally admitted to the country, arises from the fact that though we are a federation of sovereign states, the component parts may not isolate themselves and restrict the freedom of persons to establish residence or travel freely in the states.

Such was the reasoning which led this Court to hold unconstitutional an Arizona law restricting the right of aliens to work in common occupations, thereby excluding them from residence. In *Truax v. Raich*, this Court found that the attempt to exclude aliens from residence in certain states by state action would be derogatory of the power of Congress under which those aliens had been lawfully admitted to the country. In that decision, this Court spoke of the right of aliens, without the interference of the states, to enjoy "in their full scope the privileges conferred by admission."

In the words of Mr. Justice CARDOZA, our Constitution was "formed upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division."<sup>13</sup>

Attempts by the states to isolate themselves from the economic disasters of other sections of the country by limiting the right of citizens to travel freely within the country have been struck down by this Court as subversive of the welfare of the nation on much the same basis, though reliance was placed on the commerce clause in so doing.<sup>14</sup>

Political and economic reality in a world of shrinking dimensions give added emphasis to the legal requirement that the states of our nation must form a unit for the purpose of determining the right to live within the states, which is, of course, contingent upon the right to earn a living within the states:

The ultimate result of laws such as that here challenged, if valid, would be to vest in the Federal government the right to make only an empty legal determination of the right of an alien to enter the United States while granting to the forty-eight states the power, by forty-eight individual laws, to exclude such persons from the United States. Viewed in that light, the interference with an inherent and necessary power of Federal sovereignty is clear and for that reason alone, this law is invalid.

<sup>13</sup> *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 523.

<sup>14</sup> *Edwards v. California*, 314 U. S. 160.

### III.

**A state law denying to a racial group the right to engage in a common occupation violates the obligations of the United States under the United Nations Charter.**

While the statute on its face purports to have a certain impartiality by describing the proscribed group as "persons ineligible to citizenship," the 1940 Census Report<sup>15</sup> shows only 48,158 aliens ineligible to citizenship in the country, of which 33,569 were Japanese aliens residing in California. By the same census only 853 aliens ineligible to citizenship, other than Japanese, resided in the entire United States. These figures conclusively establish that the legislation before this Court is aimed at one racial or national group and one alone—the Japanese.

Whatever the protections furnished in the Federal Constitution against state legislation unreasonably discriminating on racial or national grounds, it is clear today that the Federal government has pledged itself, with the other members of the United Nations, to fulfill in good faith an obligation to promote "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>16</sup>

The United Nations Charter, as a treaty duly executed by the President and ratified by the Senate<sup>17</sup> is declared to be the supreme law of the land by Article VI, Section 2 of the Constitution and any laws of any state to the contrary must fall before this non-discriminatory provision of a treaty obligation.

<sup>15</sup> U. S. Census, 1940, "Characteristics of the Non-White Population," p. 2.

<sup>16</sup> United Nations Charter, Articles 55 and 56.

<sup>17</sup> 51 Stat. 1031.

There can be no doubt that the right to work is one of the fundamental freedoms to which the United Nations Charter refers. It has been so declared by numerous decisions of this Court. As was stated by this Court in *Truax v. Raich, supra*,

"It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the (14th) Amendment to secure."

This principle has been reiterated under many different circumstances, and the right to work has been protected against action only indirectly that of the government.<sup>18</sup>

While the interest of nations in foreign affairs was originally confined to the treatment of their own nationals in other countries, the scope of international negotiations has been constantly broadening. At the close of the First World War treaties signed between many nations provided for the protection of civil rights of national minorities in no way related to the parties signatory. More recently our government included such provisions in treaties of peace with Italy, Bulgaria, Hungary and Roumania.<sup>19</sup> That Japan is not yet a member of the United

<sup>18</sup> See *Allgeyer v. State of Louisiana*, 165 U. S. 589; *Steele v. Louisiana & Nashville R. R. Co.*, 323 U. S. 192.

<sup>19</sup> "Making the Peace Treaties," Dept. of State Publications, 2274, European Series; 16 State Dept. Bulletin 1077, 1080, 1082. See also Resolution No. 51 of the International American Conference on Problems of War and Peace, Mexico City, 1945; Department of State Bulletin No. 4, March 18, 1945, pp. 347-451. See also the Resolution adopted by the Eighth International Conference of American States at Lima, Peru, in 1938, reading in part as follows: "That the democratic conceptions of the state guarantees to all individuals the conditions essential for carrying on their legitimate activities with self-respect." Document on Foreign Policy, Vol. I, 1938-1939, World Peace Foundation, p. 49.



Nations in no way diminishes the obligation of this country to treat Japanese aliens resident here fairly and in a non-discriminatory manner. Our failure to do so has serious implications for world peace.

The passage of such laws as have existed in this country discriminating against the Japanese, including the congressional action depriving them of the possibility of becoming American citizens and their exclusion under the Quota Act, does not pass unnoticed in other nations. Even in 1924 when means of communication were much less developed, word of the Japanese Exclusion Act caused anti-American demonstrations and denunciations of our country in Japan.<sup>20</sup> Today the Japanese press and the press of all nations follow more closely than in 1924 the practices with which we implement our protestations of democratic principles. As was stated by Mr. Dean Acheson on May 8, 1946, when he was Acting Secretary of State:<sup>21</sup>

"the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over

<sup>20</sup> Y. Ichihashi, Japanese in the United States (Stanford University 1932, p. 315).

<sup>21</sup> Final Report, FEPC, June 28, 1946, p. 6.

the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed."

As stated by Mr. Justice BLACK in his concurring opinion in *Oyama v. California*, *supra*:

"How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

Within the framework of a federal form of government there may be many fields in which the United Nations Charter will require specific enabling legislation before it becomes an effective obligation upon the people of the United States. Yet certain aspects of the Charter are by force of American law sufficiently clear to constitute the supreme law of the land as a self-executing obligation and thus to supersede state laws which violate them.

That the law here presented for review must fall before the supremacy of a treaty obligation of the United States was recognized by the concurring opinion in the *Oyama* case. Indeed, Mr. Justice MURPHY said of the Alien Land Law that it

"does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations . . . Human liberty is in too great a peril today to warrant ignoring that principle in this case. For that reason I believe that the penalty of unconstitutionality should be imposed upon the Alien Land Law."

### ***Conclusion.***

If at other times in our history there were moral grounds for the protection of unpopular minorities, there are today compelling practical reasons for the revitalizing of the practices of democracy within our borders. The statute here challenged not only vitiates constitutional guarantees of personal freedom, but weakens our nation in a field in which the Federal government is supreme. For these reasons it is respectfully submitted that the judgment of the Supreme Court of California be reversed.

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1947

No. 533

TORAO TAKAHASHI,

*Petitioner*

*vs.*

FISH AND GAME COMMISSION, LEE F. PAYNE,  
as Chairman thereof, W. B. WILLIAMS, HARVEY E.  
HASTAIN, and WILLIAM SILVA, as members thereof,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

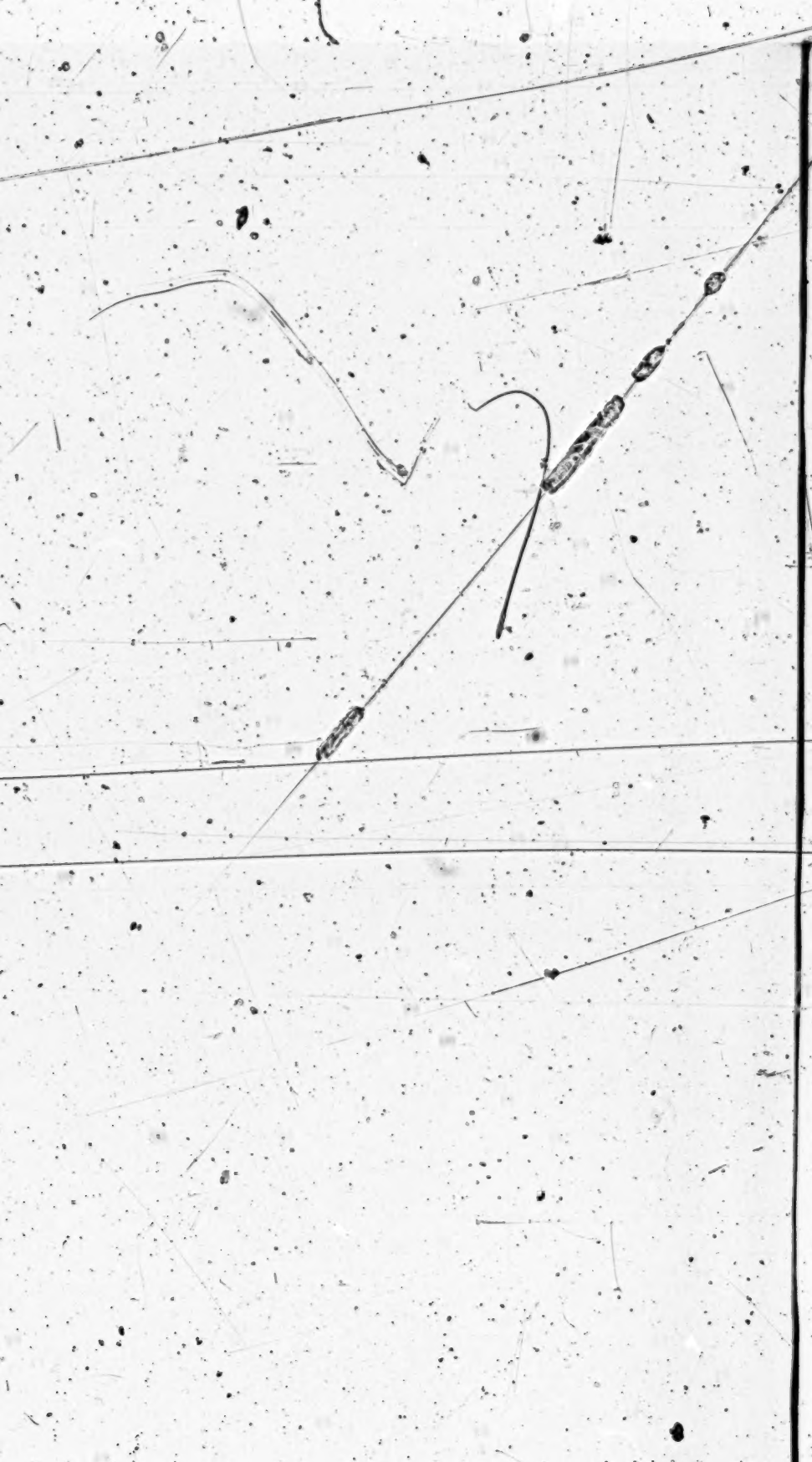
**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,  
AMICUS CURIAE**

AMERICAN CIVIL LIBERTIES UNION,  
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IN THE  
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**TORAO TAKAHASHI,**  
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**FISH AND GAME COMMISSION, LEE F. PAYNE, as Chairman  
thereof, W. B. WILLIAMS, HARVEY E. HASTAIN, and WILLIAM  
SILVA, as members thereof,**

*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,  
AMICUS CURIAE**

This brief is filed with the consent of the parties. The American Civil Liberties Union is devoted to the protection of all persons, citizens and aliens alike, in the enjoyment of the fundamental civil rights which are guaranteed by the Constitution of the United States. One of its prime objectives is the elimination of inequalities based

on racial discrimination in the degree of recognition accorded such rights, and it believes that the present case involves a highly significant instance of such discrimination.

### Statement of the Case

The judgment of the Supreme Court of California to be reviewed by this Court denies the application of petitioner, a Japanese ineligible to citizenship in the United States, for a writ of mandate directing the Fish and Game Commission of the state to issue to him a commercial fishing license.

In its opinion in this case, 30 Cal. (2d) 719, 185 P. (2d) 805, the court below, three judges dissenting, held valid Section 990 of the Fish and Game Code (Deering's California Codes), which provides as follows:

"Persons required to procure license: To whom issuable. Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state, shall procure a commercial fishing license.

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship. . . ."

In so deciding, the California Supreme Court reversed the holding of the Superior Court that the above statute constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Petitioner, a resident of California for 35 years before his evacuation by military order in 1942, was from 1915

until the date of such evacuation engaged in the occupation of commercial fishing on the high seas, holding licenses from the State Fish and Game Commission as a commercial fisherman. Because he is ineligible to citizenship solely by reason of his race, petitioner has now been denied the opportunity to earn a livelihood either by fishing in waters subject to the jurisdiction of the State of California or by bringing into that state for sale fish taken by him in other waters.

### POINT I

**The exclusion of petitioner, because he is ineligible to citizenship, from the occupation of fishing denies him the equal protection of the laws.**

Uninhibited by the constitutional limitations which the Fourteenth Amendment imposes on the states, the Congress of the United States has denied to the members of certain races the privilege of becoming citizens by naturalization (8 U.S.C., §703). But a state derives no power whatever to impose racial discriminations upon resident aliens from the Congressional power to exclude some or all aliens from naturalization on a racial basis. The members of those races who are lawfully here, no less than others, are in need of and entitled to the equal protection of the laws of the various states. To hold that because of their racial ineligibility to citizenship these people constitute a class by themselves at whom special legislation by the states may be aimed is nothing less than to deny them protection equal to that afforded other persons.



This Court at the current Term held unconstitutional California's Alien Land Law as applied to effect an escheat of agricultural land conveyed to the citizen son of an alien Japanese, where the consideration for the transfer was paid by the Japanese father. *Oyama v. California*, 332 U. S. 633. The statute in question forbade aliens ineligible for American citizenship to acquire, own, occupy, lease, or transfer agricultural land. While the narrow holding of the Court was that the Alien Land Law deprived the citizen son of the equal protection of the laws and of his privileges as an American citizen by presuming that the transfer to him was made with intent to evade the law because the consideration was paid by his ineligible alien father, four Justices, concurring in two separate opinions, were of the view that in forbidding the ownership of land by an ineligible alien the law was unconstitutional as violating the equal protection clause of the Fourteenth Amendment. The court found it unnecessary to reach that question. The concurring opinion of Mr. Justice Black considers the statute here in question, barring alien Japanese from the fishing industry, as being on the same level with respect to the Fourteenth Amendment as the Alien Land Law, 332 U. S. 633, at 648-9.

A majority of the court below relied for the result reached in the instant case on its decision in *People v. Oyama* sustaining the constitutionality of the Alien Land Law, which was reversed by this Court in *Oyama v. California*, *supra*. Even were it conceded *arguendo* that a statute prohibiting the ownership of land by aliens ineligible to citizenship must at the present time be held constitutional, such a case has been distinguished from one involving a statute which would deny to aliens the

right to earn a living, in a common occupation of the community. *Terrace v. Thompson*, 263 U. S. 197, at 221. Discrimination between aliens on the ground of race is hardly more justifiable than the discrimination between citizens on the ground of racial descent condemned by this Court in the *Oyama* case.

The argument of the state that the statute is not at least on its face solely discriminatory against Japanese and hence not race legislation of a kind proscribed by the equal protection clause of the fourteenth amendment is sheer sophistry. Assuming *arguendo* that persons of other races than Japanese are also barred, the state's argument means in effect that any legislation to secure "White supremacy" could be constitutional since the discrimination falls equally on all non-white races. Merely to state this proposition is to see its fallacy and absurdity.

We are told by the majority opinion of the court below (185 P. (2d) 805, 812) that a classification which excludes from fishing privileges those aliens who are ineligible to citizenship is a reasonable conservation measure. That classification, however, is based not on the kinds of fish to be taken, or the season or the method or the quantity of the taking, but solely on the ancestry of the fisherman. We respectfully submit that such a classification has no rational relation to the purported conservatory intent of the legislature, and on its face is unlawfully discriminatory.

The court below did not hold, nor have respondents contended, that the power to deny fishing privileges is free of constitutional restraint. The state's interest in fish and game within its jurisdiction is a qualified ownership, held in trust for the people of the state, under

which the taking and subsequent use may be regulated in the exercise of the police power for purposes of conservation—but not for such other purposes as caprice or prejudice may suggest (see *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 11).

Long ago a federal Circuit Court held invalid against Chinese a California statute precisely comparable to that which has been sustained in the instant case. *In re Ah Chong*, 2 Fed. 733 (C.C.D. Cal., 1880). The statute ~~there~~ involved prohibited fishing for sale by persons incapable of becoming electors of the state. The Court in its opinion in that case recognized the proprietary right of the state in the preservation of its game fish, earlier enunciated by this Court in *McCready v. Virginia*, 94 U. S. 391; which would permit the denial of fishing privileges to all persons not citizens of the state. It was held nevertheless that the discrimination among aliens violated both a treaty then existing between the United States and China, and the Fourteenth Amendment to the Federal Constitution. In words which epitomize our contention here—substituting only “Japanese” for “Chinese”, the irrational winds of prejudice having shifted in the intervening years—the Court said (2 Fed. at 737):

“The fourteenth amendment of the national constitution provides that ‘no state shall . . . deny to *any person* within its jurisdiction the equal protection of the laws.’ To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protec-

tion of the laws, contrary to those provisions of the constitution."

Commenting on the *Ah Chong* case, this Court said in *Clarke v. Deckenbach*, 274 U. S. 392, 396 that it is an instance where "the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens."

We respectfully urge that the contrary holding of the Supreme Court of California in the instant case should be reversed.

## POINT II

**The court below erred in applying a presumption of constitutionality to the statute here involved.**

The opportunity of all persons, whether citizen or alien, to find employment in the common occupations of the community is an important civil liberty which the states may not infringe. To allow denial of this opportunity by a state would in effect deny the possibility of settling to those whose admission Congress has permitted. See *Oyama v. California*, 332 U. S. 633, 649 (concurring opinion). This Court has been solicitous to assure the just treatment of aliens in whatever state they may reside. *Truax v. Raich*, 239 U. S. 33; *Hines v. Davidowitz*, 312 U. S. 52. That solicitude is needed for the protection of this petitioner who, upon returning to California from his enforced wartime evacuation, has found himself excluded from his former occupation.

The instant case was decided upon the pleadings without proof or suggestion of facts which would make such exclusion appear reasonable in the exercise of any power possessed by the state. This lack was supplied by the



application of a presumption of constitutionality (majority opinion, 185 P. (2d) 805, 810). We submit that such a presumption has no place in this case where the civil rights of a racial minority are in issue. In *Korematsu v. U. S.*, 323 U. S. 214, 216 the need for such searching review was repeated in words plainly applicable to the instant case:

"It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such regulations; racial antagonism never can."

### POINT III

**The discrimination enforced by state law against petitioner on the ground of race violates the United Nations Charter.**

Legislation such as that presently before the Court constitutes discrimination on the ground of race. The legislative history of the statute emphasizes that this is its purpose.\* To permit enforcement of such a discrimination embodied in state law would conflict with the treaty obligation undertaken by the United States under the United Nations Charter, to "promote . . . universal

\* Section 990 of the California Fish and Game Code, first codified in 1933, was amended in 1943 to provide that "A commercial fishing license may be issued to any person other than an alien Japanese". Stats. 1943, ch. 1100. In 1945 the present words "a person ineligible to citizenship" were substituted for "an alien Japanese", following a report by a committee of the California Senate that such change would probably eliminate the danger that the statute would be declared unconstitutional on the grounds of discrimination. *Report of the Senate Fact-Finding Committee on Japanese Resettlement*, May 1, 1945, pp. 5-6.

respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." United Nations Charter, Articles 55 c and 56; 59 Stat. 1046 (1945).

Since the foregoing obligation is under Article VI clause 2 of the Constitution, the supreme law of the land,\* it follows that the statute must be denied enforcement for this reason as well.

### CONCLUSION

It is respectfully submitted that the decision of the California Supreme Court be reversed and the California statute here involved be declared unconstitutional.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,  
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\* *Nielson v. Johnson*, 279 U. S. 47; *Missouri v. Holland*, 252 U. S. 416. For the particular applicability of the cited Charter provisions to anti-Japanese legislation, see *Oyama v. California*, 332 U. S. 633, 649, 650, 673 (concurring opinions).



1, 2, 3, 4, 5, 6, 8, 9

# SUPREME COURT OF THE UNITED STATES

No. 533.—OCTOBER TERM, 1947.

Torao Takahashi

v.

Fish and Game Commission, Lee  
F. Payne, as Chairman thereof,  
W. B. Williams, Harvey E.  
Hastain, and William Silva, as  
members thereof.

On Writ of Certiorari  
to the Supreme  
Court of the State  
of California.

[June 7, 1948.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The respondent, Torao Takahashi, born in Japan, came to this country and became a resident of California in 1907. Federal laws, based on distinctions of "color and race," *Hidemitsu Toyota v. United States*, 268 U. S. 402, 411-412, have permitted Japanese and certain other non-white racial groups to enter and reside in the country, but have made them ineligible for United States citizenship.<sup>1</sup> The question presented is whether California can,

<sup>1</sup> The comprehensive laws adopted by Congress regulating the immigration and naturalization of aliens are included in Title 8 of the U. S. Code; for codification of laws governing racial and color prerequisites of aliens to citizenship see 8 U. S. C. § 703. An act adopted by the first Congress in 1790 made "free white persons" only eligible for citizenship. 1 Stat. 103. Later acts have extended eligibility of aliens to citizenship to the following groups: in 1870, "aliens of African nativity and . . . persons of African descent," 16 Stat. 254, 256; in 1940, "descendants of races indigenous to the Western Hemisphere," 54 Stat. 1137, 1140; in 1943, "Chinese persons or persons of Chinese descent," 57 Stat. 600, 601; and in 1946, Filipinos and "persons of races indigenous to India," 60 Stat. 416. While it is not wholly clear what racial groups other than Japanese are now ineligible to citizenship, it is clear that Japanese are among the few groups still not eligible, see *Oyama v. California*, 332 U. S. 633, 635, n. 3, and that, according to the 1940 census, Japanese aliens constituted the great majority of aliens living in the United States then ineligible for citizenship. See concurring opinion of Mr. JUSTICE MURPHY in *Oyama v. California*, *supra* at 650, 665, 666, nn. 20 and 22.



## 2 TAKAHASHI v. GAME COMMISSION.

*federal* consistently with the ~~U.S.~~ Constitution and laws passed pursuant to it, use this ~~federally~~ created racial ineligibility for citizenship as a basis for barring Takahashi from earning his living as a commercial fisherman in the ocean waters off the coast of California.

Prior to 1943 California issued commercial fishing licenses to all qualified persons without regard to alienage or ineligibility to citizenship. From 1915 to 1942 Takahashi, under annual commercial fishing licenses issued by the State, fished in ocean waters off the California coast, apparently both within and without the three-mile coastal belt, and brought his fresh fish ashore for sale. In 1942, while this country was at war with Japan, Takahashi and other California residents of Japanese ancestry were evacuated from the State under military orders. See *Korematsu v. United States*, 323 U. S. 214. In 1943, during the period of war and evacuation, an amendment to the California Fish and Game Code was adopted prohibiting issuance of a license to any "alien Japanese." Cal. Stats. 1943, ch. 1100. In 1945, the state code was again amended by striking the 1943 provision for fear that it might be "declared unconstitutional" because directed only "against Japanese";<sup>2</sup> the new amendment banned issuance of licenses to any "person ineligible to citizenship," which classification included Japanese. Cal. Stats. 1945, ch. 181.<sup>3</sup> *alien* Because of this state

<sup>2</sup> Report of the California Senate Fact-Finding Committee on Japanese Resettlement, May 1, 1945, pp. 5-6.

<sup>3</sup> As amended the code section now reads: "Persons required to procure license: To whom issuable. Every person who uses or operates or assists in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks or crustaceans for profit, or who brings or causes fish, mollusks or crustaceans to be brought ashore at any point in the State for the purpose of selling the same in a fresh state, shall procure a commercial fishing license.

"A commercial fishing license may be issued to any person other than a person ineligible to citizenship. A commercial fishing license

2

provision barring issuance of commercial fishing licenses to persons ineligible for citizenship under federal law, Takahashi, who met all other state requirements, was denied a license by the California Fish and Game Commission upon his return to California in 1945.

Takahashi brought this action for mandamus in the Superior Court of Los Angeles County, California, to compel the Commission to issue a license to him. That court granted the petition for mandamus. It held that lawful alien inhabitants of California, despite their ineligibility to citizenship, were entitled to engage in the vocation of commercial fishing on the high seas beyond the three-mile belt on the same terms as other lawful state inhabitants, and that the California code provision denying them this right violated the equal protection clause of the Fourteenth Amendment. The State Supreme Court, three judges dissenting, reversed, holding that California had a proprietary interest in fish in the ocean waters within three miles of the shore, and that this interest justified the State in barring all aliens in general and aliens ineligible to citizenship in particular from catching fish within or without the three-mile coastal belt and bringing them to California for commercial purposes. ~~30 Adams Cal. Rep. 723~~, 185 Pac. 2d 805.<sup>4</sup> To review

may be issued to a corporation only if said corporation is authorized to do business in this State, if none of the officers or directors thereof are persons ineligible to citizenship, and if less than the majority of each class of stockholders thereof are persons ineligible to citizenship." Cal. Fish and Game Code § 990. In 1947 the code was amended to permit "any person, not a citizen of the United States," to obtain hunting and sport fishing licenses, both of which had been denied to "alien Japanese" and to persons "ineligible to citizenship" under the 1943 and 1945 amendments. Cal. Stats. 1947, c. 1329; Cal. Fish and Game Code §§ 427, 428.

<sup>4</sup> The Superior Court first ordered issuance of a commercial fishing license authorizing Takahashi to bring ashore "catches of fish from the waters of the high seas beyond the state's territorial jurisdiction." After appeal to the State Supreme Court by the State Commission

— Cal. 2d

#### 4 TAKAHASHI v. GAME COMMISSION.

this question of importance in the fields of federal-state relationships and of constitutionally protected individual equality and liberty, we granted certiorari.

We may well begin our consideration of the principles to be applied in this case by a summary of this Court's holding in *Truax v. Raich*, 239 U. S. 33, not deemed controlling by the majority of the California Supreme Court, but regarded by the dissenters as requiring the invalidation of the California law. That case involved an attack upon an Arizona law which required all Arizona employers of more than five workers to hire not less than eighty (80) per cent qualified electors or native-born citizens of the United States. Raich, an alien who worked as a cook in a restaurant which had more than five employees, was about to lose his job solely because of the state law's coercive effect on the restaurant owner. This Court, in upholding Raich's contention that the Arizona law was invalid, declared that Raich, having been lawfully ad-

the Superior Court amended its judgment so as to order a commercial license authorizing Takahashi to bring in catches of fish taken from the three-mile ocean belt adjacent to the California Coast as well as from the high seas. The State Supreme Court held that the Superior Court was without jurisdiction to amend its judgment after appeal and accordingly treated the amended judgment as void. California argues here that its State Fish and Game Commission is authorized by statute to issue only one type of commercial fishing license, namely, one permitting ocean fish to be brought ashore whether caught within or without the three-mile belt, that the Superior Court's first judgment ordering issuance of a license limited to catches of high seas fish directed the Commission to do something it was without authority to do, and that on this ground we should affirm the state court's denial of the requested license. The State Supreme Court did not, however, decide the case on that ground, but ruled against petitioner on the ground that the challenged code provision was valid under the Federal Constitution and that the Commission's refusal to grant a license was required by its terms. Since the state court of last resort relied solely upon federal grounds for its decision, we may properly review its action here.

mitted into the country under federal law, had a federal privilege to enter and abide in "any state in the union" and thereafter under the Fourteenth Amendment to enjoy the equal protection of the laws of the state in which he abided; that this privilege to enter in and abide in any state carried with it the "right to work for a living in the common occupations of the community," a denial of which right would make of the Amendment "a barren form of words." In answer to a contention that Arizona's restriction upon the employment of aliens was "reasonable" and therefore permissible this Court declared:

"It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." *Truax v. Raich*, *supra* at 42.

Had the *Truax* decision said nothing further than what is quoted above, its reasoning, if followed, would seem to require invalidation of this California code provision barring aliens from the occupation of fishing as incon-



sistent with federal law, which is constitutionally declared to be "the supreme Law of the Land." However, the Court there went on to note that it had on occasion sustained state legislation that did not apply alike to citizens and non-citizens, the ground for the distinction being that such laws were necessary to protect special interests either of the state or of its citizens as such. The *Truax* opinion pointed out that the Arizona law, aimed as it was against employment of aliens in *all* vocations, failed to show a "special public interest with respect to any particular business . . . that could possibly be deemed to support the enactment." The Court noted that it had previously upheld various state laws which restricted the privilege of planting oysters in the tidewater rivers of a state to citizens of that state, and which denied to aliens within a state the privilege of possessing a rifle and of shooting game within that state; it also referred to decisions recognizing a state's broad powers, in the absence of overriding treaties, to restrict the devolution of real property to non-aliens.<sup>5</sup>

California now urges, and the State Supreme Court held, that the California fishing provision here challenged falls within the rationale of the "special public interest" cases distinguished in the *Truax* opinion, and thus that the state's ban upon commercial fishing by aliens ineligible to citizenship is valid. The contention is this: California owns the fish within three miles of its coast as a trustee for all California citizens as distinguished from its non-citizen inhabitants; as such trustee-owner, it has complete power to bar any or all aliens from fishing in the three-mile belt as a means of conserving the supply of fish; since migratory fish caught while swimming in the three-mile belt are indistinguishable from those caught

<sup>5</sup> The opinion cited the following cases: *McCready v. Virginia*, 94 U. S. 391; *Patsone v. Pennsylvania*, 232 U. S. 138; *Hauenstein v. Lynham*, 100 U. S. 483; and *Blythe v. Hinkley*, 180 U. S. 333.

while swimming in the adjacent high seas, the State, in order to enforce its three-mile control, can also regulate the catching and delivery to its coast of fish caught beyond the three mile belt under this Court's decision in *Bayside Fish Co. v. Gentry*, 297 U. S. 422. Its law denying fishing licenses to aliens ineligible for citizenship, so the state's contention goes, tends to reduce the number of commercial fishermen and therefore is a proper fish conservation measure; in the exercise of its power to decide what groups will be denied licenses, the State has a right, if not a duty, to bar first of all aliens, who have no community interest in the fish owned by the State. Finally, the legislature's denial of licenses to those aliens who are "ineligible to citizenship" is defended as a reasonable classification, on the ground that California has simply followed the Federal Government's lead in adopting that classification from the naturalization laws.

*First.* The state's contention that its law was passed solely as a fish conservation measure is vigorously denied. The petitioner argues that it was the outgrowth of racial antagonism directed solely against the Japanese, and that for this reason alone it cannot stand. See *Korematsu v. United States*, *supra* at 216; *Kotch v. Board of River Pilot Comm'rs*, 330 U. S. 552, 556; *Yick Wo v. Hopkins*, 118 U. S. 356; *In re Ah Chong*, 2 F. 733, 737. We find it unnecessary to resolve this controversy concerning the motives that prompted enactment of the legislation. Accordingly, for purposes of our decision we may assume that the code provision was passed to conserve fish in the California coastal waters, or to protect California citizens engaged in commercial fishing from competition by Japanese aliens, or for both reasons.

*Second.* It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same

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classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living. The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See *Hines v. Davidowitz*, 312 U. S. 52, 66. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.<sup>6</sup> Moreover, Congress in the enactment of a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization, has broadly provided:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 16 Stat. 140, 144, 8 U. S. C. § 41.

The protection of this section has been held to extend to aliens as well as to citizens.<sup>7</sup> Consequently the section

<sup>6</sup> *Truax v. Raich*, *supra*; *Chy Lung v. Freeman*, 92 U. S. 275, 280; see *Hines v. Davidowitz*, *supra* at 65-68.

<sup>7</sup> *Yick Wo v. Hopkins*, *supra* at 369; *United States v. Wong Kim Ark*, 169 U. S. 649, 696; *In re Tiburcio Parrott*, 1 F. 481, 508-509; *Fraser v. McConway & Torley Co.*, 82 F. 257.

and the Fourteenth Amendment on which it rests in part protect "all persons" against state legislation bearing unequally upon them either because of alienage or color. See *Hurd v. Hodge*, 383 U. S. —. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws. 334/

All of the foregoing emphasize the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization. The state's law here cannot be supported in the employment of this legislative authority because of policies adopted by Congress in the exercise of its power to treat separately and differently with aliens from countries composed of peoples of many diverse cultures, races, and colors. For these reasons the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits. S.

*Third.* We are unable to find that the "special public interest" on which California relies provides support for this state ban on Takahashi's commercial fishing. As before pointed out, California's claim of "special public interest" is that its citizens are the collective owners of fish swimming in the three-mile belt. It is true that this Court did long ago say that the citizens of a state collectively own "the tidewaters . . . and the fish in them so far as they are capable of ownership while running." *McCready v. Virginia*, 94 U. S. 391, 394. Cf. *United States v. California*, 332 U. S. 1938; *Toomer v. Witsell*, No. 415 October 1947 Term. The *McCready* case upheld a Vir-



ginia law which prohibited citizens of other states from planting oysters in a Virginia tidewater river. Though the *McCready* case has been often distinguished, its rationale has been relied on in other cases, including *Geer v. Connecticut*, 161 U. S. 519. That decision, where only the commerce clause was involved, sustained a state law that, in order to restrict the use of game to the people of the state, prohibited the out-of-state transportation of game killed within the state. On the other hand, where Louisiana laws declared that the state owned all shrimp within the waters of the state, but permitted ultimate sale and shipmer<sup>+</sup> of shrimp for consumption outside that state's boundaries, Louisiana was denied power under the commerce clause to require the local processing of shrimp taken from Louisiana marshes as a prerequisite to out-of-state transportation. *Foster Packing Co. v. Haydel*, 278 U. S. 1. In the absence of overriding federal treaties, this Court sustained a state law barring aliens from hunting wild game in the interest of conserving game for citizens of the state against due process and equal protection challenges. *Patson v. Pennsylvania*, 232 U. S. 138. Later, however, the Federal Migratory Bird Treaty Act of 1918, 40 Stat. 755, was sustained as within federal power despite the claim of Missouri of ownership of birds within its boundaries based on prior statements as to state ownership of game and fish in the *Geer* case. *Missouri v. Holland*, 252 U. S. 416. The Court was of opinion that "To put the claim of the State upon title is to lean upon a slender reed." P. 434. We think that same statement is equally applicable here. To whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.

This leaves for consideration the argument that this law should be upheld on authority of those cases which have sustained state laws barring aliens ineligible to citizenship from land ownership.\* Assuming the continued validity of those cases,\* we think they could not in any event be controlling here. They rested solely upon the power of states to control the devolution and ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property. They cannot be extended to cover this case.

The judgment is reversed and remanded for proceedings not inconsistent with this opinion.

*Reversed.*

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\* *Terrace v. Thompson*, 263 U. S. 197; *Porterfield v. Webb*, 263 U. S. 225; *Webb v. O'Brien*, 263 U. S. 313; *Frick v. Webb*, 263 U. S. 326.

\* See *Oyama v. California*, 332 U. S. 633, 646, 649, 672.



# SUPREME COURT OF THE UNITED STATES

No. 533.—OCTOBER TERM, 1947.

Torao Takahashi,

v.

Fish and Game Commission, Lee  
F. Payne, as Chairman thereof,  
W. B. Williams, Harvey E.  
Hastain, and William Silva, as  
members thereof.

On Writ of Certiorari  
to the Supreme  
Court of the State  
of California.

[June 7, 1948.]

MR. JUSTICE MURPHY, with whom MR. JUSTICE RUTLEDGE agrees, concurring.

The opinion of the Court, in which I join, adequately expresses my views as to all but one important aspect of this case. That aspect relates to the fact that § 990 of the California Fish and Game Code, barring those ineligible to citizenship from securing commercial fishing licenses, is the direct outgrowth of antagonism toward persons of Japanese ancestry. Even the most cursory examination of the background of the statute demonstrates that it was designed solely to discriminate against such persons in a manner inconsistent with the concept of equal protection of the laws. Legislation of that type is not entitled to wear the cloak of constitutionality.

The statute in question is but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century. See concurring opinion in *Oyama v. California*, 332 U. S. 633, 650, and dissenting opinion in *Korematsu v. United States*, 323 U. S. 214, 233. That fever, of course, is traceable to the refusal or the inability of certain groups to adjust themselves economically and socially relative to residents of Japanese ancestry. For some years prior to the Japanese attack on Pearl Harbor, these protago-



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nists of intolerance had been leveling unfounded accusations and innuendoes against Japanese fishing crews operating off the coast of California. These fishermen numbered about a thousand and most of them had long resided in that state. It was claimed that they were engaged not only in fishing but in espionage and other illicit activities on behalf of the Japanese Government. As war with Japan approached and finally became a reality, these charges were repeated with increasing vigor. Yet full investigations by appropriate authorities failed to reveal any competent supporting evidence; not even one Japanese fisherman was arrested for alleged espionage. Such baseless accusations can only be viewed as an integral part of the long campaign to undermine the reputation of persons of Japanese background and to discourage their residence in California. See McWilliams, *Prejudice* (1944), ch. VII.

More specifically, these accusations were used to secure the passage of discriminatory fishing legislation. But such legislation was not immediately forthcoming. The continued presence in California of the Japanese fishermen without the occurrence of any untoward incidents on their part served for a time as adequate and living refutation of the propaganda. Then came the evacuation of all persons of Japanese ancestry from the West Coast. See *Korematsu v. United States*, *supra*. Once evacuation was achieved, an intensive campaign was begun to prevent the return to California of the evacuees. All of the old charges, including the ones relating to the fishermen, were refurbished and augmented. This time the Japanese were absent and were unable to provide effective opposition. The winds of racial animosity blew unabated.

During the height of this racial storm in 1943, numerous anti-Japanese bills were considered by the California legislators. Several amendments to the Alien Land Law were enacted. And § 990 of the Fish and Game Code

was altered to provide that "A commercial fishing license may be issued to any person other than an alien Japanese." No pretense was made that this alteration was in the interests of conservation. It was made at a time when all alien Japanese were excluded from California, with no immediate return indicated; thus the banning of fishing licenses for them could have no early effect upon the conservation of fish. Moreover, the period during which this amendment was passed was one in which both federal and state authorities were doing their utmost to encourage greater food production for wartime purposes. The main desire at this time was to increase rather than to decrease the catch of fish. Certainly the contemporaneous bulletins and reports of the Bureau of Marine Fisheries of California did not indicate the existence of any conservation problem due to an excess number of fishermen. See Thirty-Eighth Biennial Report (July 1, 1944), pp. 33-36; Fish Bulletin No. 58, for the year 1940; Fish Bulletin No. 59, for the years 1941 and 1942.

These circumstances only confirm the obvious fact that the 1943 amendment to § 990 was intended to discourage the return to California of Japanese aliens. By taking away their commercial fishing rights, the lives of those aliens who plied the fisherman's trade would be made more difficult and unremunerative. And the non-Japanese fishermen would thereby be free from the competition afforded by these aliens. The equal protection clause of the Fourteenth Amendment, however, does not permit a state to discriminate against resident aliens in such a fashion, whether the purpose be to give effect to racial animosity or to protect the competitive interests of other residents.

The 1945 amendment to § 990 which is now before us stands in no better position than the 1943 amendment. This later alteration eliminated the reference to "alien Japanese" and substituted therefor "a person ineligible to citizenship." Adoption of this change also occurred

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during a period when anti-Japanese agitation in California had reached one of its periodic peaks. The announcement of the end of the Japanese exclusion orders, plus this Court's decision in *Ex parte Endo*, 323 U. S. 283, made the return to California of many of the evacuees a reasonable certainty. The prejudices, the antagonisms and the hatreds were once again aroused, punctuated this time by numerous acts of violence against the returning Japanese Americans. Another wave of anti-Japanese proposals marked the 1945 legislative session. It was in this setting that the amendment to § 990 was proposed and enacted in 1945.

It is of interest and significance that the amendment in question was proposed by a legislative committee devoted to Japanese resettlement problems, not by a committee concerned with the conservation of fish. The Senate Fact-Finding Committee on Japanese Resettlement issued a report on May 1, 1945. This report dealt with such matters as the Alien Land Law, the Japanese language schools, dual citizenship and the Tule Lake riot. And under the heading "Japanese Fishing Boats" (pp. 5-6) appeared this explanation of the proposed amendment to § 990:

"The committee gave little consideration to the problems of the use of fishing vessels on our coast owned and operated by Japanese, since this matter seems to have previously been covered by legislation. The committee, however, feels that there is danger of the present statute being declared unconstitutional, on the grounds of discrimination, since it is directed against alien Japanese. It is believed that this legal question can probably be eliminated by an amendment which has been proposed to the bill which would make it apply to any alien who is ineligible to citizenship. The committee has introduced Senate Bill 413 to make this change in the statute."

Not a word was said in this report regarding the need for the conservation of fish or the necessity of limiting the number of fishermen. The obvious thought behind the amendment was to attempt to legalize the discrimination against Japanese alien fishermen by dropping the specific reference to them.

The proposed revision was adopted. The trial court below correctly described the situation as follows: "As it was commonly known to the legislators of 1945 that Japanese were the only aliens ineligible to citizenship who engaged in commercial fishing in ocean waters bordering on California, and as the Court must take judicial notice of the same fact, it becomes manifest that in enacting the present version of Section 990, the Legislature intended thereby to eliminate alien Japanese from those entitled to a commercial fishing license by means of description rather than by name. To all intents and purposes and in effect the provision in the 1943 and 1945 amendments are the same, the thin veil used to conceal a purpose being too transparent. Under each and both, alien Japanese are denied a right to a license to catch fish on the high seas for profit, and to bring them to shore for the purpose of selling the same in a fresh state . . . this discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, . . . ."

We should not blink at the fact that § 990, as now written, is a discriminatory piece of legislation having no relation whatever to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It



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denies them commercial fishing rights not because they threaten the success of any conservation program, not because their fishing activities constitute a clear and present danger to the welfare of California or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests. We need but unbutton the seemingly innocent words of § 990 to discover beneath them the very negation of all the ideals of the equal protection clause. No more is necessary to warrant a reversal of the judgment below.

# SUPREME COURT OF THE UNITED STATES

No. 533.—OCTOBER TERM, 1947.

Torao Takahashi

v.

Fish and Game Commission, Lee F. Payne, as Chairman thereof, W. B. Williams, Harvey E. Hastain, and William Silva, as members thereof.

On Writ of Certiorari to the Supreme Court of the State of California.

[June 7, 1948.]

MR. JUSTICE REED, dissenting.

The reasons which lead me to conclude that the judgment of the Supreme Court of California should be affirmed may be briefly stated. As fishing rights have been treated traditionally as a natural resource, in the absence of federal regulation, California as a sovereign state has power to regulate the taking and handling of fish in the waters bordering its shores.<sup>1</sup> It is, I think, one of the natural resources of the state that may be preserved from exploitation by aliens.<sup>2</sup> The ground for this power in the absence of any exercise of federal authority is California's authority over its fisheries.

The right to fish is analogous to the right to own land, a privilege which a state may deny to aliens as to land

<sup>1</sup> *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 425.

The statute, see note 3 of the Court's opinion for the text, seems obviously to cast no burden on commerce.

A Washington statute similar to the one now before us was considered in *Lubetich v. Pollock*, 6 F. 2d 237.

<sup>2</sup> Even citizens of other states have been excluded by a state from such opportunities. *McCready v. Virginia*, 94 U. S. 391 (planting oyster beds). Fishing licenses discriminating between residents and non-residents are permissible. *Haavik v. Alaska Packers Assn.*, 263 U. S. 510.

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within its borders. *Terrace v. Thompson*, 263 U. S. 197.<sup>3</sup> It is closely akin to the right to hunt, a privilege from which a state may bar aliens, if reasonably deemed advantageous to its citizens.<sup>4</sup> A state's power has even been held to extend to the exclusion of aliens from the operation of pool and billiard halls when a city deemed them not as well qualified as citizens for the conduct of a business thought to have harmful tendencies. *Clarke v. Deckebach*, 274 U. S. 392.<sup>5</sup>

The Federal Government has not pursued a policy of equal treatment of aliens and citizens. Citizens have rights superior to those of aliens in the ownership of

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<sup>3</sup> The right of an alien to own land is controlled by the law of the state in which the land is located. Such was the rule of the common law. *Collingwood v. Pace*, 1 Vent. 413, 86 Eng. Rep. 262. That has long been the law of nations, 2 Vattel, *Law of Nations* (1883) c. 8, § 114, and has been accepted in this country. *Chirac v. Chirac*, 2 Wheat. 259; *Levy v. M'Cartee*, 6 Pet. 102, 113; *Hauenstein v. Lynham*, 100 U. S. 483; *Blythe v. Hinckley*, 180 U. S. 333, 341. Whether the philosophical basis of that power, or the power over fish and game, is a theory of ownership or trusteeship for its citizens or residents or conservation of natural resources or protection of its land or coasts is not material. The right to control the ownership of land rests in sovereign governments and, in the United States, it rests with the individual states in the absence of federal action by treaty or otherwise.

<sup>4</sup> *Patson v. Pennsylvania*, 232 U. S. 138. In expressing the conclusion of a unanimous Court, Mr. Justice Holmes phrased the rule as follows, pp. 145-46: "It is to be remembered that the subject of this whole discussion is wild game, which the State may preserve for its own citizens, if it pleases."

<sup>5</sup> In that case a unanimous Court, speaking through Mr. Justice Stone, said, p. 396:

"The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, . . . it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification."

land and in exploiting natural resources.\* Perhaps Congress as a matter of immigration policy may require that states open every door of opportunity in America to all resident aliens, but until Congress so determines as to fisheries, I do not feel that the judicial arm of the Government should require the states to admit all aliens to this privilege.

Certainly *Truax v. Raich*, 239 U. S. 33, upon which the majority opinion appears to rely in holding that the California statute denies equal protection in attempting to classify aliens by putting restrictions on their right to land fish, is not an authority for such a decision. The power of a state to discriminate against aliens on public works and the exploitation of natural resources was recognized in that case.<sup>7</sup> And, at the very time that it was under consideration, this Court also had before it *Heim v. McCall*, 239 U. S. 175.<sup>8</sup> In that case, Heim attacked

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\* The United States limits the rights of aliens as compared with citizens in land ownership in its territories, 8 U. S. C. §§ 71-86; in disposition of mineral lands, 30 U. S. C. § 181; of public lands, 43 U. S. C. § 161; in engaging in coastwise trade, 46 U. S. C. §§ 11, 13; in operating aircraft, 49 U. S. C. §§ 176 (c), 521.

It was deemed necessary to limit the benefits of the Emergency Relief Appropriation Act of 1938 to aliens who had "filed a declaration of intention to become an American citizen . . ." 52 Stat. 809, 813.

<sup>7</sup> 239 U. S. 33, 39-40: "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. . . . The case now presented is not within these decisions, or within those relating to the devolution of real property . . . ; and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise."

<sup>8</sup> *Truax v. Raich*, *supra*, was argued October 15, 1915, and decided November 1, 1915; *Heim v. McCall*, *supra*, was argued October 12, 1915, and decided November 29, 1915.



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the constitutionality of a New York statute which provided that "In the construction of public works by the State or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the State of New York."<sup>9</sup> A unanimous court held that the statute, which was attacked on the ground that it denied aliens their rights under the privileges and immunities, due process, and equal protection clauses of the Constitution, was a constitutional exercise of state power as applied to the construction of New York City subways by private contractors.<sup>10</sup> The Constitution that permits the bar of aliens from public works surely must permit their bar from state fishing rights. A state has power to exclude from enjoyment of its natural resources those who are unwilling or unable to become citizens.

If aliens, as I think they can, may be excluded by a state from fishing privileges, I see no reason why the classification established by California excluding only aliens ineligible to citizenship is prohibited by the Constitution. *Terrace v. Thompson*, 263 U. S. 197, 220. Whatever we may think of the wisdom of California's statute, we should intervene only when we conclude the state statute passes constitutional limits.

MR. JUSTICE JACKSON joins in this dissent.

<sup>9</sup> 239 U. S. 175, 176-77.

<sup>10</sup> The problem of natural resources was not directly discussed in the opinion. But it is clear that the Court was not unaware of the relation of its decision to the natural resources cases. See 239 U. S. 175, 194. The fact that this case was before the Court at the same time as *Truax v. Raich*, probably explains the careful reservation of the natural resources and public works problems in that case. See 239 U. S. 33, 39-40.

